

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:) Case No. 08-13141(KJC)
)
)
TRIBUNE COMPANY) Chapter 11
)
) Courtroom 5
) 824 Market Street
Debtors.) Wilmington, Delaware
)
) April 13, 2011
) 10:00 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JUDGE KEVIN J. CAREY
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For Debtors: Sidley Austin, LLP
BY: JAMES CONLAN, ESQ.
BY: BRYAN KRAKAUER, ESQ.
BY: KEN KANSA, ESQ.
BY: KEVIN LANTRY, ESQ.
One South Dearborn
Chicago, IL 60603
(312) 853-7000

Cole, Schotz, Meisel, Forman
& Leonard, P.A.
BY: NORMAN PERNICK, ESQ.
500 Delaware Ave., Ste. 1410
Wilmington, DE 19801
(302) 652-3131

ECRO: AL LUGANO

Transcription Service: DIAZ DATA SERVICES
331 Schuylkill Street
Harrisburg, Pennsylvania 17110
(717) 233-6664
www.diazdata.com

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APPEARANCES:
(Continued)

For Oaktree & Angelo Gordon: Young Conaway Stargatt &
Taylor
BY: BLAKE CLEARY, ESQ.
BY: ROBERT BRADY, ESQ.
The Brandywine Building
1000 West Street, 17th Floor
Wilmington, DE 19801
(302) 571-6600

Dewey & LeBeouf
BY: JOSHUA MESTER, ESQ.
BY: JAMES JOHNSTON, ESQ.
333 S. Grand Ave., Ste. 2600
Los Angeles, CA 90071-1530
(213) 621-6021

For Merrill Lynch: Potter Anderson & Carroon, LLP
BY: LAURIE SILVERSTEIN, ESQ.
BY: R. STEPHEN MCNEILL, ESQ.
Hercules Plaza
1313 North Market Street
6th Floor
Wilmington, DE 19801
(302) 984-6033

For Barclays: DLA Piper
BY: MICHELLE MARINO, ESQ.
1251 Avenue of the Americas
New York, NY 10020-1104
(212) 335-4500

For Barclays & Waterstone
Capital Management: Latham & Watkins, LLP
BY: JASON SANJANA, ESQ.
885 Third Avenue
New York, NY 10022-4834
(212) 906-4587

APPEARANCES:
(Continued)

For U. S. Trustee: United States Trustee
BY: DAVID KLAUDER, ESQ.
BY: PAT TINKER, ESQ.
844 King Street, Ste. 2207
Wilmington, DE 19801
(302) 573-6491

For JP Morgan: Davis Polk & Wardwell
BY: ELLIOT MOSKOWITZ, ESQ.
BY: DAMIEN SCHAIBLE, ESQ.
BY: MICHAEL RUSSANO, ESQ.
BY: ELI VONNEGUT, ESQ.
450 Lexington Avenue
New York, NY 10017
(212) 450-4000

Richards Layton & Finger
BY: ROBERT STEARN, ESQ.
BY: DREW SLOAN, ESQ.
One Rodney Square
920 North King Street
Wilmington, DE 19801
(302) 651-7700

For Wilmington Trust: Brown Rudnick
BY: MARTIN SIEGEL, ESQ.
BY: ROBERT STARK, ESQ.
185 Asylum Street
Hartford, CT 06103
(860)509-6519

Sullivan Hazeltine Allinson,
LLC
BY: WILLIAM HAZELTINE, ESQ.
4 East 8th Street, Suite 400
Wilmington, DE 19801
(302) 4268-8191

APPEARANCES:
(Continued)

For Official Committee
of Unsecured Creditors:

Landis, Rath & Cobb
BY: DANIEL B. RATH, ESQ.
BY: ADAM G. LANDIS, ESQ.
919 Market Street, Suite 1800
Wilmington, DE 19801
(302) 467-4400

Chadbourn & Parke, LLP
BY: DAVID LEMAY, ESQ.
BY: HOWARD SEIFE, ESQ.
BY: JAMES STENGER, ESQ.
BY: DOUGLAS DEUTSCH, ESQ.
BY: THOMAS MCCORMACK, ESQ.
BY: ANDREW ROSENBLATT, ESQ.
BY: MARC ASHLEY, ESQ.
30 Rockefeller Plaza
New York, NY 10112
(212) 408-5100

Zuckerman Spaeder
BY: JAMES SOTTILE, ESQ.
BY: ANDREW GOLDFARB, ESQ.
1800 M Street, NW
Suite 1000
Washington, DC 20036
(202) 778-1800

For Great Banc:

Womble Carlyle
BY: THOMAS M. HORAN, ESQ.
222 Delaware Avenue, Ste. 1501
Wilmington, DE 19801
(302) 252-4339

K & L Gates, LLP
BY: JEFFREY RICH, ESQ.
599 Lexington Avenue
New York, NY 10022-7615

APPEARANCES:
(Continued)

For DBTCA:

McCarter & English
BY: KATHARINE MAYER, ESQ.
405 N. King Street, 8th Fl.
Wilmington, DE 19801
(302) 984-6312

For Aurelius:

Akin Gump Strauss Hauer & Feld
BY: DANIEL GOLDEN, ESQ.
BY: PHIL DUBLIN, ESQ.
BY: ABID QUERSHI, ESQ.
One Bryant Park
New York, NY 10036
(212) 872-1000

Ashby & Geddes
BY: WILLIAM BOWDEN, ESQ.
500 Delaware Avenue
Wilmington, DE 19809
(302) 654-1888

For U.S. Department of
Labor:

U.S. Department of Labor
BY: LEONARD GEARSON, ESQ.
200 Constitution Ave., NW
Washington, DC 20210

For SuttonBrook Capital
Management:

Schulte Roth & Zabel, LLP
BY: LAWRENCE V. GELBER, ESQ.
919 Third Avenue
New York, NY 10022
(212) 756-2460

Klehr Harrison Harvy
Branzburg, LLP
BY: MICHAEL W. YURKEWICZ, ESQ.
919 Market St., Ste. 1000
Wilmington, DE 19801-3062
(302) 552-5519

APPEARANCES:
(Continued)

For Tribune:

Tribune Company
BY: DON LIEBENTRITT, ESQ.
435 North Michigan Avenue
Chicago, IL 60611
(312) 222-9100

For Brigade Capital
Management:

Loizides, PA
BY: CHRIS LOIZIDES, ESQ.
1225 King Street, Suite 800
Wilmington, DE 19801
(302) 654-0248

For Robert McCormick Foundation
Tribune Foundation &
Cantiguy Foundation:

Duane Morris
BY: RICHARD W. RILEY, ESQ.
222 Delaware Ave., Ste. 1600
Wilmington, DE 19801-1659
(302) 657-4928

Katten Muchin Rosenman, LLP
BY: DAVID BOHAN, ESQ.
525 West Monroe St.
Chicago, IL 60661-3693
(312) 902-5566

For Zell & EGI - TRB:

Jenner & Block
BY: DAVID BRADFORD, ESQ.
BY: CATHY STEEGE, ESQ.
BY: DAVID CARICKHOFF, ESQ.
353 North Clark Street
Chicago, IL 60654-3456
(312) 923-2952

For Crone Kenney:

Shaw Gussis
BY: ALLEN GUON, ESQ.
321 N. Clark St., Ste. 800
Chicago, IL 60654
(312) 541-0151

APPEARANCES:
(Continued)

For Timothy Knight:

A. M. Saccullo Legal, LLC
BY: ANTHONY M. SACCULLO, ESQ.
27 Crimson King Drive
Bear, DE 19701
(302) 836-8877

Hannafan & Hannafan, Ltd.
BY: BLAKE HANNAFAN, ESQ.
One East Wacker Dr., Ste. 2800
Chicago, IL 60601
(312) 527-0055

For Certain Officers &
Directors:

Grippo & Elden
BY: JOHN McCAMBRIDGE, ESQ.
BY: GEORGE DOUGHERTY, ESQ.
111 S. Wacker Drive
Chicago, IL 60606
(312) 704-7700

Connolly Bove Lodge & Hutz LLP
BY: JEFFREY WISLER, ESQ.
The Nemours Building
10007 North Orange Street
Wilmington, DE 19899
(302) 888-6258

TELEPHONIC APPEARANCES:

For SuttonBrook Capital:

SuttonBrook Capital
Management, LP
BY: CAROL L. BALE, ESQ.
(212) 588-6640

For Bank of America:

O'Melveny & Myers
BY: DANIEL SHAMAH, ESQ.
(212) 326-2138

Bank of America
BY: ESTHER CHUNG, ESQ.
(646) 855-6705

TELEPHONIC APPEARANCES:
(Continued)

For Official Committee of
Unsecured Creditors:

Chadbourne & Park, LLP
BY: MARC ROITMAN, ESQ.
(212)408-5271
BY: JESSICA MARRERO, ESQ.
(212) 408-5100
BY: FRANCISCO VASQUEZ, ESQ.
(212) 408-5111

Zuckerman & Spaeder, LLP
BY: GRAEM BUSH, ESQ.
BY: ANDREW GOLDFARB, ESQ.
BY: JAMES SOTTILE, ESQ.
BY: ANDREW CARIDAS, ESQ.
(202) 778-1800

Landis Rath & Cobb, LLP
BY: MATTHEW B. MCGUIRE, ESQ
(302) 467-4431

For Brigade Capital
Management:

Brigade Capital Management
BY: NEIL LOSQUADRO
(212) 745- 9758

Stutman Treister & Glatt
BY: ISAAC PACHULSKI, ESQ.
(310) 228-5655

For Citibank:

Paul Weiss Rifkind Wharton
BY: KIRA DAVIS, ESQ.
(212) 373-3000
BY: ANDREW GORDON, ESQ.
(212)373-3543
BY: ANDREW LEVY, ESQ.
(202)223-7328
BY: SHANNON PENNOCK, ESQ.
(212) 373-3000
BY: ELIZABETH MCCOLM, ESQ.
(212) 373-3000

TELEPHONIC APPEARANCES:
(Continued)

For Anna Kalenchits:

Anna Kalenchits
(212)723-1808

For Tribune:

Sidley Austin
BY: GREG DEMO, ESQ.
(312) 853-7758
BY: JANET HENDERSON, ESQ.
BY: COLLEEN KENNEY, ESQ.
(312) 853-2931
BY: BRETT MYRICK, ESQ.
(312) 853-1049
BY: DENNIS TWOOMEY, ESQ.
(312) 853-7824
BY: PATRICK WACKERLY, ESQ.
(312) 853-7000

Tribune Company
BY: MICHAEL D. ONEAL, ESQ.
(312) 222-3490
BY: GARY WEITMAN, ESQ.
(312) 222-3394
BY: DAVE ELDERSVELD, ESQ.
(312) 222-4707

For Former Special Committee
Of Tribune's Board of
Directors:

Skadden Arps Slate Meagher &
Flom
BY: NICK CAMPANARIO, ESQ.
(312) 407-0974

For Aurelius Capital
Management:

Aurelius Capital Management LP
BY: MATTHEW A. ZLOTO, ESQ.
(646) 445-6518

Akin Gump Strauss Hauer & Feld
BY: SHAYA ROCHESTER, ESQ.
(212) 872-1076
BY: DAVID ZENSKY, ESQ.
(212) 309-6000

TELEPHONIC APPEARANCES:
(Continued)

For Partner Fund Management: Vinson & Elkins, LLP
BY: LANCE A. MULHERN, ESQ.
(212) 237-0184

For JP Morgan Chase Bank: Davis Polk & Wardwell, LLP
BY: PETER KIM, ESQ.
(212) 450-3028

JP Morgan Chase Bank, NA
BY: SHACHAR MINKOVE, ESQ.
(212) 834-7174

For Barclays: Mayer & Brown, LLP
BY: AMIT K. TREHAN, ESQ.
(212) 506-1717
BY: JEAN-MARIE ATAMIAN, ESQ
(212) 506-2678
BY: MICHAEL L. SIMES, ESQ.
(212) 506-2607
BY: BEN WILSON, ESQ.
(212) 412-7642

Latham & Watkins, LLP
BY: JASON B. SANJANA, ESQ.
(212) 906-4587

For Eos Partners: Eos Partners
BY: MIKE J. SCHOTT, ESQ.
(212) 593-4046

For Merrill Lynch: Kaye Scholer, LLP
BY: MADLYN G. PRIMOFF, ESQ.
(212) 836-7042
BY: JONATHAN AGUDELO, ESQ.
(212) 836-8369
BY: JANE PARVER, ESQ.
(212) 836-8510

For DK Partners: DK Partners
BY: EPHRAIM DIAMOND, ESQ.
(646) 282-5841

TELEPHONIC APPEARANCES:
(Continued)

For Monarch Alternative
Capital, LP:

Monarch Alternative Capital
BY: ROBERT G. BURNS, ESQ.
(212) 554-1768

For Kramer Levin:

Kramer Levin, Naftalis &
Frankel, LLP
BY: DAVID E. BLABEY, JR., ESQ.
(212) 715-9100
BY: JORDAN KAYE, ESQ.
(212) 715-9489

For CitiGroup:

Paul Weiss Rifkind Wharton &
Garrison
BY: AMY DEITERICH, ESQ.
(212) 373-3688

For Nomura Securities:

Nomura Securities
BY: ARTHUR KAVALLIS, ESQ.
(212) 667-2370

For Great Banc Trust Co.:

Morgan Lewis & Brockius, LLP
BY: DEBORAH S. DAVIDSON, ESQ.
(215) 552-6900

For Interested Party:

Schulte Roth & Zabel, LLP
BY: KAREN S. PARK, ESQ.
(212) 756-2036

For EGI-TRB:

Jenner & Block, LLP
BY: ANDREW VAIL, ESQ.
(312) 840-8688

For Credit Agreement
Lenders:

Angelo Gordon & Company, LP
BY: GAVIN BAIERA, ESQ.
(212) 692-0217

Wilmer Cutler Pickering Hale &
Dorr
BY: MICHELLE GOLDIS, ESQ.
(212) 295-6329
BY: ANDREW GOLDMAN, ESQ.
(212) 230-8836

TELEPHONIC APPEARANCES:
(Continued)

For Mina Faltas:	Viking Global Investors BY: MINA FALTAS, ESQ. (212) 672-7011
For Chandler Bigelow:	Sperling & Slater BY: STEVEN C. FLORSHEIM, ESQ. BY: CLAIRE P. MURPHY, ESQ. (312)641-3200
For Goldman Sachs & Co.:	Goldman Sachs & Company BY: SCOTT BYNUM, ESQ. (212) 902-8060 BY: LEXI FALLON, ESQ. (212) 902-0791
For Matthew Frank:	Alvarez & Marsal, Inc. BY: MATTHEW FRANK (312)371-9955 BY: BRIAN WHITTMAN, ESQ. (312) 601-4227
For Wells Fargo:	White & Case BY: SCOTT GREISSMAN, ESQ. (212) 819-8567
For Law Debenture Trust:	Kasowitz Benson Torres & Friedman BY: SHERON KORPUS, ESQ. (212)506-1700 BY: CHRISTINE MONTENEGRO, ESQ. (212)506-1715 BY: DAVID ROSNER, ESQ. (212)506-1726
For Oaktree Capital Management:	Oaktree Capital Management BY: EDGAR LEE (213) 830-6415
For Canyon Partners:	Canyon Partners BY: CHANEY M. SHEFFIELD (310) 272-1062

TELEPHONIC APPEARANCES:
(Continued)

For One East Partners:	One East Partners BY: SINA TOUSSI (212) 230-4510
For Robert R. McCormick Foundation & Cantigny Foundation:	Katten Muchin Rosenman, LLP BY: JOHN SIEGER, ESQ. (312) 902-5294
For Macquarie Capital (USA):	Macquarie Capital (USA) BY: RUSHABH VORA (212) 231-6311
For Cooperstown Capital Management:	Cooperstown Capital Management BY: PEETER COURI, ESQ. (203)552-6900
For Serengeti Asset Management:	Serengeti Asset Management BY: NICHOLAS HEILBUT, ESQ. (212) 466-2167
For Pryor Cashman, LLP:	Pryor Cashman, LLP BY: TINA MOSS, ESQ. (212) 326-0421
For Contrarian Capital Management:	Contrarian Capital Management BY: JOSHUA TRUMP, ESQ. (203) 862-8299
For Smith Management:	Smith Management BY: JENNIFER WILD, ESQ. (212) 418-6877
For Great Bank Trust Co.:	Morgan Lewis & Bockius, LLP BY: MENACHEM ZELMANOVITZ, ESQ. (212) 309-6000

1 WILMINGTON, DELAWARE, WEDNESDAY, APRIL 13, 2011, 10:09 A.M.

2 THE CLERK: Be seated, please.

3 THE COURT: Good morning, everyone.

4 ALL: Good morning, Your Honor.

5 MR. LANTRY: Good morning, Your Honor. Kevin
6 Lantry on behalf of the debtors.

7 Your Honor, we have circulated to all the third
8 party objectors the schedule which is largely like we
9 proposed and presented to you yesterday. There have been a
10 few additional changes. If I may approach with that revised
11 schedule and a red line?

12 THE COURT: That'd be great.

13 MR. LANTRY: Your Honor, just a couple of
14 housekeeping things. We have tried through what both of the
15 plan proponents filed a large chart on Friday indicating
16 what has been resolved and what has not been resolved, as
17 well as, notices that went out to all the third party
18 objectors either by email or fax or overnight on Friday as
19 well. We think we have identified everyone who's been
20 resolved so that they don't need to be here. There's always
21 the chance that something fell through the cracks.

22 So what we would suggest having distributed this
23 list is if someone is here for something that has been they
24 think resolved or otherwise that isn't on this list, that
25 they try to see the applicable plan proponents during the

1 first break and talk about it. I think that's easier than
2 anything else interrupting.

3 THE COURT: All right, I think that's fine.

4 MR. LANTRY: In addition, Your Honor, we have
5 found as of last night in terms of the changes that are on
6 this list that the Department of Labor's objection to the
7 noteholders' plan has been resolved so we move that forward
8 since it was an objection to both plans. So that's one of
9 the changes you see there.

10 In addition, Your Honor, the PHONES priority and
11 amount, the parties raising that issue, it is pertinent to
12 both plans, it's not really objection to both plans. We
13 have been hearing from Wilmington Trust that he believes
14 from chatting with him it may be a very quick administrative
15 matter. So we might be able to take care of that early. I
16 don't know if it really is, but they have at least asked to
17 go to the front of the line. I'm not sure we want to grant
18 that because if everyone wanted to go the front of the line
19 to get out of here, but I promised that I would at least
20 raise that with you before we started with the agenda.
21 Right now it's put toward the end of the day.

22 THE COURT: Well, I'm curious about how it could
23 be characterized as a quick administrative matter. And if
24 someone wants to speak to that briefly, I will hear it.

25 MR. YURKEWICZ: Good morning, Your Honor.

1 Michael Yurkewicz with Klehr, Harrison, Harvey, Branzburg &
2 Ellers on behalf of Suttonbrook Capital Management. With me
3 today is Mr. Larry Gelber of Schulte Roth & Zabel. He has
4 been admitted pro hoc in this case. I ask that he be heard
5 on this matter.

6 THE COURT: Okay.

7 MR. GELBER: Good morning, Your Honor. Lawrence
8 Gelber of Schulte, Roth & Zabel.

9 I apologize, sitting in the back I couldn't hear
10 what the issue was that you had raised that you wanted to
11 have addressed.

12 THE COURT: Well --

13 (Laughter)

14 THE COURT: Mr. Lantry indicated that there was
15 an issue concerning the PHONES which parties wished me
16 address ahead of that which had been proposed by the parties
17 in the nature of a quick administrative matter and I'm
18 curious about what that might be.

19 MR. GELBER: Oh, I'm sorry. This is a
20 continuation. We had a hearing back in January on the
21 amount on the estimation of the PHONES claims based on the
22 motion of Wilmington Trust. We didn't know -- Your Honor
23 entered an order at that time saying it would be taken up at
24 the confirmation hearing or in the context of the
25 confirmation hearing and we just didn't know how Your Honor

1 wanted to deal with that.

2 THE COURT: Were you here yesterday?

3 MR. GELBER: No I was not.

4 THE COURT: You should have been. And I answered
5 that question. Let's go back to the agenda.

6 MR. GELBER: Okay. Thank you, Your Honor.

7 MR. LANTRY: Thank you, Your Honor, for that
8 clarification.

9 I would only say one other thing in terms of this
10 will progress today. We would ask that each of the
11 objectors try to articulate all of their individual
12 objections at once so that they will complete their
13 presentation. To the extent then the various plan
14 proponents have a response, we would generally have the DCL
15 plan proponents' response go first and then the noteholder
16 plan, if they have something additional to say in response
17 to those objections. When there are multiple objectors on a
18 peer issue, for example, as we get down into the list,
19 objections to the creditors' trust or objections to the bar
20 order, we thought it would be better for each of those
21 objectors to articulate their issues in a non-duplicative
22 way. And when that's completed, then the plan proponents
23 get up and respond.

24 I think that's the most efficient way to do it,
25 but I just thought I would put that out there as what we

1 have tentatively thought would be the most organized way of
2 doing this.

3 THE COURT: Does anyone have contrary view?
4 (No audible response.)

5 THE COURT: I hear no response.

6 MR. LANTRY: In addition, Your Honor, just so you
7 know, although of the issues have to go through your head in
8 the end, we have divided our labors and many of us will be
9 getting up on behalf of the plan proponents and articulating
10 different points. Hopefully, we will have orchestrated that
11 in advance, but I just wanted you to know that a number of
12 us have divided the labor and so it will be articulated by a
13 variety of different parties --

14 THE COURT: All right.

15 MR. LANTRY: -- but I think we know who that will
16 be.

17 THE COURT: That's fine. I just ask that counsel
18 remember to identify themselves for the record as they come
19 up to address each individual objection or response.

20 MR. LANTRY: With that, Your Honor, the first
21 individual objection is by Kevin Millen. I don't know if
22 he's here in the courtroom.

23 THE COURT: Let me ask for the record. Mr.
24 Millen are you present in the courtroom or on the telephone?

25 MR. LANTRY: Your Honor, I would ask that my

1 partner, Ken Kansa just briefly articulate the objection for
2 you in his -- Mr. Millen's absence.

3 THE COURT: Okay.

4 MR. KANSA: Good morning, Your Honor. Ken Kansa
5 of Sidley Austin on behalf of the debtors.

6 The first objection as Mr. Lantry noted is the
7 objection of Kevin Millen confirmation. Your Honor,
8 although the pleading has been styled as an objection to
9 both the responsive statements, the disclosure, and the plan
10 of reorganization, the objection articulates no cognizable
11 or substantive objection to confirmation of the debtor
12 committee lender plan. The pleading is a near verbatim
13 reworking of the prior pleadings that have been filed by Mr.
14 Millen in which he seeks allowance of an alleged defamation
15 claim relating to a 1998 article that was published in the
16 Hartford Current. Those claims were disallowed by this
17 Court pursuant to an order entered on June 14 of last year
18 at Docket Number 4775. There has been no appeal so that
19 order disallowing those claims has long become final.

20 There was also a similar pleading filed by Mr.
21 Millen seeking administrative relief that was disallowed by
22 this Court on September 13 of last year on a similar basis
23 to what we would ask the Court to deny the instant pleading
24 for. Namely, there was not an articulation by Mr. Millen in
25 the pleading of any basis on which the Court could grant the

1 relief requested. For that reason here, we ask that this
2 confirmation objection to the extent that it's taken as such
3 be denied, Your Honor.

4 THE COURT: Does anyone else wish to be heard in
5 connection with this objection?

6 (No audible response.)

7 THE COURT: All right. This objection is
8 overruled.

9 MR. KANSA: Thank you, Your Honor.

10 MR. LANTRY: The next objection, Your Honor is
11 the Department of Labor and that is an objection just now to
12 the DCL plan.

13 MR. GERSON: Good morning, Your Honor, Leonard
14 Gerson. I'm appearing for the United States Department of
15 Labor.

16 As Mr. Lantry stated at the beginning of this
17 hearing, an agreement has been reached between the
18 Department and the noteholders essentially to put off the
19 resolution of the issue of whether the Secretary's claims
20 are subject to 501(b) to a time after confirmation and
21 instead treat those claims as disputed claims.

22 There's language that we've agreed on which in
23 substance that we've agreed upon will be added to the
24 confirmation order. I'd like to read it into the record,
25 please.

1 THE COURT: Go ahead.

2 MR. GERSON: Notwithstanding anything to the
3 contrary set forth in the noteholder plan or this
4 confirmation order, the claim filed by the United States
5 Department of Labor against Tribune Company (the DOL claim)
6 shall be treated as a disputed other parent claim, which
7 claims ultimate priority and amount shall be determined by a
8 final order, unless otherwise agreed to by the parties at a
9 time in the briefing schedule to be agreed upon by the
10 parties. The disputed claim reserve provided the noteholder
11 plan is deemed sufficient to allow for the satisfaction of
12 all disputed claims, including the DOL claim in whatever
13 amount it is ultimately allowed. Such reserve is deemed
14 sufficient to rebut any claim that the appeal of any order
15 disallowing the DOL claim is mooted as a result of the
16 noteholder plan becoming effective.

17 THE COURT: Thank you.

18 MR. GERSON: That's the end of the language, Your
19 Honor.

20 THE COURT: All right.

21 MR. GERSON: Now with respect to our objection to
22 the DCL plan.

23 Congress gave the Secretary of Labor the role of
24 protecting a worker the time in plan from exploitation.
25 That fundamental goal of ERISA is being undermined by the

1 DCL plans' subordination of the Secretary's claim. Under
2 the DCL plan, the Secretary's claims under ERISA will be
3 paid nothing.

4 There are many reasons why a failure to provide
5 any recovery on those claims should be denied, but the
6 fundamental failure is the DCL plan proponents ignoring the
7 difference between claims under ERISA and the claims of
8 ordinary investors. 501(b) of the Bankruptcy Code as the
9 Court is aware is directed at preventing investors from
10 darning the cloaks of predators if their investment goes
11 south.

12 In contrast, the Secretary's claims arise from
13 violations by the Tribune and the trustee that it appointed,
14 Great Banc, for a violation of their fiduciary duties under
15 ERISA. If the claims were based on the Tribune's
16 misrepresentations to the ESOP in connection with the sale
17 of the Tribune stock to the ESOP, the Secretary understands
18 that those claims would be property subordinated under
19 501(b). But ERISA interposes a fiduciary between a plan's
20 investment decisions and those decisions. Our claim arises
21 from the violation of the ESOP's fiduciary, its trustee, the
22 Great Banc.

23 In leaning on ERISA, Courts are careful to
24 distinguish the claims of shareholders from the claims
25 arising from violations of ERISA. For example, in *Martin v.*

1 *Fallon*, it was a situation where basically the -- a company
2 was despoiled by the actions of its management who also to
3 some extent were fiduciaries and professionals who assisted
4 them. The District Court -- the Secretary brought an action
5 against them. The District Court found the fiduciaries and
6 the corporate managers liable for violations of ERISA. The
7 Circuit Court reversed in part. It ruled you had to -- even
8 though the ERISA plan at issue in that case was an ESOP so
9 as -- so the ESOP was damaged by the actions taken by the
10 corporate managers because they were shareholders. So as to
11 the extent the corporation was injured, so was the ESOP.

12 With respect to ERISA claims, it was necessary to
13 distinguish what claims were being brought under ERISA and
14 what claims the defendants were liable because of their
15 mismanagement of the corporations which would be claims of
16 shareholders. To the extent that the District Court's
17 findings of liability with respect to the ERISA claims
18 involved violations of fiduciary duties, the Circuit Court
19 upheld the District Court's findings. To the extent the
20 District Court's ruling found the defendants liable under
21 ERISA for actions involving corporate mismanagement, the
22 Circuit Court reversed. And we believe those same
23 principles are applicable in this case.

24 We understand that 501(b) arguably is not limited
25 to cases involving securities fraud, but is recognized by

1 the Third Circuit there are limits to the 501(b) scope.
2 It's sometimes argued that 501(b) has remedial purpose and
3 because it's remedial, it should be broadly construed. But
4 ERISA also is a remedial statute. In fact, that fact is --
5 Congress stated that fact explicitly in 29 USC 1001. ERISA
6 explicitly states that its passage was critical to the
7 wellbeing of millions of workers and their dependents.
8 Congress also made their concern for ERISA plan participants
9 evident of the Bankruptcy Code itself when it provided
10 priority for failures by employers to make their
11 contributions to ERISA plans.

12 So it would seem strange that on one hand
13 Congress would provide a priority under the Bankruptcy Code
14 for contributions to ERISA plans, but at the same time wish
15 to subordinate other ERISA plans. That lack of congruity is
16 also reflected in the treatment of what would be the
17 treatment of the tax claims in this case under Section 4975.
18 Section 4975 imposes a penalty upon breaches upon prohibited
19 transactions under Section 406 of ERISA. But before that
20 penalty is imposed, it gives the Department of Labor the
21 opportunity to work out corrective measures with the
22 violators. If the plans are made whole, there's no penalty
23 imposed. If our ERISA claims are subordinated, then the tax
24 claims which ordinarily would be subordinated to the claims
25 under ERISA if there was corrective action taken, would

1 instead be superior to our ERISA claims. It's the
2 Secretary's belief that that simply doesn't make any sense.

3 Ultimately, what the Third Circuit stated was
4 that in order to understand the scope of ERISA and the scope
5 of the claims it covers, one had to examine its -- ERISA's -
6 - I'm sorry, Section 501(b) legislative history. And that
7 history has essentially been universally recognized as
8 arising from the article by Professors Slain and Kripke
9 which was used by the Bankruptcy Law Commission and
10 ultimately by Congress in enacting 501(b).

11 Slain and Kripke and Congress recognized there
12 were two critical corrections that made subordination under
13 501(b) required. First, they didn't want to see the equity
14 cushion provided by investors eroded by having the
15 investor's claims becoming claims of creditors because that
16 equity cushion was supposed to be there to protect
17 creditors. That protection would be eliminated if those
18 investors then could darn the cloaks of creditors. But as
19 the Court is aware, that's not what happened in the leverage
20 stock transaction of the Tribune. The equity cushion was
21 virtually wiped out by the buyback of shareholder stock and
22 instead as was evident from the examiner's report, what the
23 creditors in the leverage buyout were relying upon was not
24 any equity cushion that might be provided by the ESOP, but
25 instead, the tax advantages that would be derived from the -

1 - having an ESOP structure for the Tribune. So
2 subordinating the Secretary's claims to protect any equity
3 cushion is simply not a rational in this case.

4 Similarly, the other major purpose of
5 subordinating claims was belief by Congress that investors
6 had assumed the risk of corporate insolvency rather than
7 creditors. And thus it would be unfair to impose upon
8 creditors that risk that investors had chosen to take.
9 However, in this case, it is clear that the lenders knew --
10 were very well aware of the risks that were involved with
11 the potential insolvency.

12 I mean, that's really the crux of the debate
13 going on between the noteholder plan and the DCL plan as the
14 extent to which those claims should be settled. In
15 contrast, the workers were given no choice. The ESOP was
16 imposed upon them as opposed to the 401K plan which they
17 previously provided retirement benefits for them. So that
18 alternative reason for providing or subordinating claims
19 under 501(b) also is irrelevant with respect to the facts in
20 this case.

21 In addition, as the Court is aware, 501(b) is
22 directed at claims arising from the purchase and sale of
23 securities. There was -- as everyone involved in this case
24 knows, this -- the ESOP leverage transaction was viewed as a
25 two step process. As part of the first step, the ESOP

1 purchased the Tribune's shares. The second step involved a
2 merger of a wholly owned ESOP subsidiary and the Tribune.
3 That Great Banc, the Tribune's trustee could have decided
4 not to go forward with that merger independent of the
5 purchase of stock that had been made. The ESOP transaction
6 still would have involved some kind of loss for the ESOP
7 because the stock they purchased obviously wasn't worth \$250
8 million, but the value of that stock was greatly diminished
9 by going through with the merger transaction. And of which
10 ultimately led to the insolvency of the debtors.

11 So -- and the Tribune appointed Great Banc as the
12 ESOP's trustee. Because of that appointment, it too, was --
13 Tribune also was a fiduciary to the ESOP. As a fiduciary,
14 it had an obligation to disclose to the -- to Great Banc any
15 information that was relevant to the decisions that Great
16 Banc might make in connection with its duty as trustee. As
17 the Court is aware from the examiner's report, offices of
18 the Tribune failed to disclose critical information about
19 the likely insolvency of the Tribune if Step 2 went forward.
20 As far as the secretary is aware, that information also was
21 not imparted to Great Banc. And under the law, the
22 knowledge of a company's offices are inputted to the
23 corporation.

24 So by failing to disclose that critical
25 information to Great Banc and failing to take any action to

1 prevent Great Banc from going through with the merger, the
2 Tribune violated its obligations under Section 404 of the --
3 of ERISA for acting with prudence, loyalty, and also its
4 obligations under Section 405 of ERISA to seek to remedy any
5 violations of a co-fiduciary that it becomes aware.

6 In addition to subordinating the Secretary's
7 claims against the Tribune, the DCL plan also seeks to
8 subordinate the Secretary's claims against the Tribune
9 subsidiaries. They don't even attempt to argue that Section
10 501(b) is applicable to that subordination which it is
11 clearly not even if 501(b) applied in this case,
12 appropriately applied in this case to the Secretary's claims
13 which we don't believe is the case. With respect to our
14 claims against the subsidiary, it would only subordinate
15 those claims to the claims of other creditors of the
16 subsidiary, not to claims against the parent company.

17 501(b) also requires that if a claim is
18 subordinated under 501(b), the subordination go no further
19 than treating claims of common stock, claims of equity
20 interests and the subordinated claims on par. That's not
21 what the DCL plan does. It leaves equity interest in the
22 subsidiaries unimpaired while it pays nothing on the
23 Secretary's ERISA claims.

24 In their responsive papers, the debtors have
25 argued that it's okay to leave the equity interests

1 unimpaired while paying nothing on the claims against -- the
2 Secretary's claims against the subsidiaries because those
3 would be "extra costs that would be incurred unnecessarily."
4 But the fact that additional costs might be incurred is no
5 basis to override Congress' explicit direction in 501(b)
6 that subordinated claims and claims of equity holders be
7 treated on par.

8 The case that the DCL proponents rely upon *Ian*
9 *Media* involved an objector who is described by the Court as
10 simply an obstructionist and not even a party of interest, a
11 characterization that certainly can't be applied to the
12 Secretary's claims. More importantly, the Court in *Ian*
13 *Media* also stated that to the extent that any value was
14 being allocated to the equity interests as a result of
15 causing them -- leaving them unimpaired, that that was
16 appropriate under the gift doctrine. As the Court is aware,
17 the gift doctrine allows secured creditors to if they
18 choose, to give some of the distributions they would
19 otherwise be entitled to lower priority creditors
20 essentially in order to get a plan confirmed.

21 THE COURT: Maybe not in the Second Circuit
22 anymore.

23 MR. GERSON: I haven't read that case, Your
24 Honor.

25 THE COURT: We'll see how it falls out.

1 MR. GERSON: But what's critical in this case is
2 that the senior lenders are giving some of the distributions
3 that otherwise might be entitled to not -- their allocating
4 it to other classes not as a gift, but in order to get some
5 real relief. They're getting a release. That's what the
6 DCL plan is all about. So the gift doctrine is inapplicable
7 to this case.

8 It's -- the fact that value is being allocated is
9 also reflected in the fact that with respect to the non-
10 guarantor subsidiary debtors, there are cash payments being
11 made by the senior lenders to those non-debtors. If there
12 was no value being allocated, there would be no reason to
13 pay -- make any payments to those non-guarantor debtors.

14 In addition, the definition of securities
15 litigation claims in the debtors -- in the DCL plan is not
16 limited to claims subordinated under 501(b), but it includes
17 -- the definition includes any claims under ERISA. That's
18 not a legal basis for subordinating a claim under the
19 Bankruptcy Code. I don't know if the DCL proponents have
20 any basis to subordinate any claims other than Section
21 501(b), but they haven't stated that. And the definition of
22 securities litigation claims needs to be amended to reflect
23 the fact that it's limited to claims under Section 501(b)
24 which the Secretary understands is the issue before the
25 Court, but not simply claims under ERISA. And the

1 definition has additional breath that, you know, is not
2 particularly decipherable.

3 The Secretary objected to the exculpation
4 provision in the DCL plan. The DCL plan proponents have
5 modified the exculpation provision to limit it to post-
6 petition actions rather than encompassing the pre-petition
7 actions as their initial plan provided. But there are
8 significant defects that remain.

9 First, the exculpation provision covers not only
10 officers of the -- not only covers people involved in the
11 formulation of the plan, the debtors and their
12 professionals, or the committee and its professionals, it
13 covers related persons whose broad definition includes
14 present or former employees, and similarly broad scope
15 including people not in -- I know of no ruling that allows
16 the definition of, you know, of an exculpation provision to
17 include non-debtor parties to that extent who haven't been
18 involved in the formulation of the plan.

19 And that's a second significant problem with the
20 exculpation provision. It's not limited to actions taken in
21 the formulating of a plan, it extends to all post-petition
22 operations of the debtors. That's not the appropriate scope
23 of an exculpation provision. Exculpation provisions are
24 supposed to protect individuals involved in the formulation
25 of Chapter 11 plans so they don't have to worry about being

1 sued sometime later. And so they can have -- they're free
2 to exercise their judgment to the best extent possible.

3 Another essential objection we had to the
4 exculpation provision was that it violates ERISA because it
5 eliminates -- it would free from liability actions for
6 negligence or any other claims that didn't arise from either
7 gross negligence or willful misconduct. I guess the major
8 support for the exculpation provision in the DCL plan was
9 the Third Circuit's *PWS* opinion. But in *PWS*, that was
10 before 2005 when the Bankruptcy Code was enacted -- I'm
11 sorry, was amended.

12 THE COURT: I knew what you meant.

13 MR. GERSON: Thank you, Your Honor.

14 THE COURT: I was there at enactment, I remember.

15 (Laughter)

16 MR. GERSON: To specifically provide that Chapter
17 11 debtors, trustees, would they have the obligation for
18 administering ERISA plans. The opinion in *PWS* was premised
19 on the fact that the freedom of liability -- the limitations
20 in liability it was providing was no greater than what was
21 ordinarily provided to creditor's committees under 1103.
22 But it didn't have the opportunity to consider the effect of
23 ERISA with respect to that exculpation provision because
24 that then was not an obligation of the debtors and Chapter 7
25 trustees.

1 THE COURT: Well let me ask you this. How would
2 you describe the interplay between ERISA and the Bankruptcy
3 Code? Is there merely tension? Is there conflict? Is
4 there ambiguity in the Bankruptcy Code's language? How
5 would you articulate that dynamic?

6 MR. GERSON: Generally or just with respect to
7 the Secretary's claims in this case?

8 THE COURT: I would say the latter.
9 (Laughter)

10 MR. GERSON: Well I think by requiring a Court to
11 look to the legislative history in order to determine the
12 scope of 501(b), it -- there's -- you know, there's a
13 recognition that the language in 501(b) is not crystal
14 clear, but --

15 THE COURT: Well, typically, Courts look to
16 legislative history when they determine -- well they do it
17 in two instances. One, when they determine the language of
18 the statute may not be clear. And/or to support a view that
19 they've reached that the language is clear and here's why.
20 So despite admonitions that Courts in cases in which the
21 statute is clear shouldn't delve too deeply into legislative
22 history, it seems they do so anyway.

23 MR. GERSON: That's -- I think that's a correct
24 observation, Your Honor. I guess the problem that the
25 tension that arises, the difficulty is a difficulty that

1 arises in frequently in non-bankruptcy situations where a
2 Court is -- where there's an overlapping of facts and the
3 Court's are required to distinguish well, what's a violation
4 of ERISA. And what's the violation of the shareholder's
5 rights? And when the shareholders are -- is an ERISA plan,
6 the -- you know, the analysis can sometimes get complicated.

7 So and that's why -- but I think there's a clear
8 way of looking at it by determining well what actions were
9 corporate actions to which the ESOP might have suffered
10 because there were shareholders and what did they suffer?
11 What -- because of violations of ESOP fiduciaries which
12 include the Tribune. But in this case, I don't think when
13 the claims get -- if, in fact, we get over the hurdle of the
14 plan and we analyze the claims, they become disputed claims,
15 then the Court will be in a position where it's going to
16 have to make that distinction as to what was a claim for
17 fiduciary breach and what was simply a claim for corporate
18 mismanagement that the ESOP suffered. But the blanket
19 provision in the DCL plan which simply subordinates all
20 ERISA claims to 501(b), doesn't provide -- doesn't allow for
21 the necessary analysis.

22 THE COURT: All right, Mr. Gerson, you need to
23 wrap up.

24 MR. GERSON: That's a wrap, Your Honor, thank
25 you.

1 THE COURT: All right, thank you.

2 MR. KRAKAUER: Good morning, Your Honor. Bryan
3 Krakauer on behalf of the debtors. I'll be addressing the
4 objection to the -- of the Department of Labor.

5 Let me start out by saying the issues raised by
6 the DOL are pertinent to both the DCL plan and the
7 noteholder plan. Although the objection to the noteholder
8 plan has now been resolved, they've resolved it by pushing
9 the issue of subordination to a later date if the noteholder
10 plan is confirmed, but it's still very much an issue in both
11 plans as to the proper treatment of the DCL claim. The DCL
12 has asserted unliquidated claims against both the Tribune
13 parent and the subsidiaries. And although the claims are
14 unliquidated in their face, they indicate in discussions
15 that they may assert very large claims of potentially
16 hundreds of millions of dollars.

17 All these claims arise by their own admission
18 from the Tribune's ESOP and what they assert are purported
19 violations of ERISA. The claims themselves if it was ever
20 got to the merits are very much disputed, but today is not
21 the time to talk about that. The issue is in our plan is
22 even if they were determined to be allowed claims, whether
23 they're properly subordinated under 501.

24 Both plans classify ERISA claims relating to the
25 ESOP as securities claims which are subordinated pursuant to

1 501(b). The DCL plan defines securities litigation claims
2 and then provides that securities litigation claims are
3 extinguished are -- because they're subordinated, there was
4 nothing there for them and, therefore, they're extinguished.
5 The noteholder plan also contains a definition of
6 subordinated securities claims which defines to include
7 ERISA claims. And provides that if a claim is found to be a
8 subordinated securities claim, that it does receive nothing.
9 The one difference is the DCL plan specifically refers to
10 the Department of Labor claim, whereas the noteholder plan
11 just refers to claims based on ERISA.

12 The DCL plan does provide that the claims are
13 extinguished. The purpose is so that the debtor can emerge
14 without the overhang of this claim. Pursuant to the DCL
15 plan, claims at the parent are paid north of 30 cents on the
16 dollar and claims against the subs are essentially paid in
17 full. So having a large unliquidated claim that's still to
18 be litigated is a significant overhang.

19 And as far as what the Department of Labor claims
20 consist of, they all arise from the Tribune common stock
21 acquired by the ESOP in the leverage ESOP transaction. The
22 Tribune stock is the only asset of the ESOP. The ESOP
23 acquired the stock by issuing a non-recourse note to Tribune
24 which was payable through yearly contributions by Tribune to
25 the ESOP which are applied against the note balance. The

1 DOL asserts that the ESOP's acquisition of that stock
2 violated ERISA. The DCL also asserts that various other
3 actions or inactions including as they've said the
4 consummation of Step 2 of the leverage ESOP transaction
5 reduced the value of that ESOP stock and also violated
6 ERISA.

7 But the common nexus for the DOL claims are
8 they're all based upon the stock, the Tribune stock.
9 They're all based upon either the acquisition of that stock
10 or on losses relating to that stock. And essentially what
11 the DOL is trying to do is assert a claim to recover for
12 losses related to that stock or claims based on the
13 acquisition of that stock.

14 501(b) provides for the subordination of claims
15 among other things, arising from the purchase or sale of the
16 security of the debtor. The debtor here, the Tribune or an
17 affiliate of the debtor. So it would apply to claims
18 against the subs because the Tribune is an affiliate of
19 those debtors as well. And the remedy under 501(b) is that
20 such claims shall be treated as subordinated. And in the
21 case of common stock like we have here, they're at the same
22 priority as the common stock of Tribune. So they're treated
23 as at the end of the priority chain. And there's nothing
24 here for common stock of the Tribune in this plan.

25 The Third Circuit's decision in *Telegroup* is the

1 leading decision quite obviously in this circuit. And it
2 rejected the theory advocated by the DOL here that 501(b) is
3 narrowly limited to claims arising solely from securities
4 laws or other illegality in connection with the stocks
5 issuance and not anything after issuance. The Third Circuit
6 found that the claims subject to 501(b) extend to claims
7 which have a nexus with a debtors' common stock that arise
8 either connection with the acquisition of the stock or which
9 afterwards arise in connection with actions or inactions
10 after the acquisition of the stock. And particularly, the
11 Court noted that 501(b) subordinates claims due to a decline
12 in the value of that stock that occurs after acquisition.
13 And the nexus test under 501(b) according to *Telegroup* is
14 whether the claims would exist but for the claimant's
15 purchase of the stock. The claimant here being the ESOP.

16 The view that 501 must be applied broadly to
17 claims based on asserted debtor wrong which resulted in a --
18 any claims based on asserted debtor wrong which is based --
19 resulted in diminution, excuse me, diminished equity value
20 is not also limited at the Third Circuit. It's been
21 followed consistently by every Court of Appeals that's
22 looked at this issue. The Second Circuit in *Med Diversified*
23 has a case. The Fifth Circuit in *Seaquist* has a case. The
24 Tenth Circuit in *Geneva Steel* has a case. And the Ninth
25 Circuit has addressed the issue and come to the same

1 conclusion in *Beta Comp.*

2 There is no Court of Appeals which has agreed
3 with the DOL in terms of the limitation that they're arguing
4 for under 501. And the *Telegroup* standard is clearly
5 satisfied here. All of the claims relate to the ESOP
6 Tribune stock acquisition and actions after that acquisition
7 that had some effect on the stock. That's what is at issue
8 in connection with the DOL claims.

9 The DOL's argument that ERISA claims are
10 different and are not subject to subordination under 501 is
11 simply wrong. There is no case out there that has held or
12 even suggested that. *Telegroup* --

13 THE COURT: Is there any case out there that
14 subordinated a government claim?

15 MR. KRAKAUER: Yes. There's a case called
16 *Lantico* which is at cited in our brief at 116BR 141 *Eastern*
17 *District of Missouri*. Specifically, the DOL was a party to
18 that case. It came in and asserted an ERISA claim based on
19 a violation, an ERISA violation of an ESOP and the Court
20 found that its claim was subordinated. It's directly on
21 point.

22 You also have in addition to the general finding
23 of *Telegroup*, you have cases like *Enron* which dealt with
24 KERP's and 401k's and found that those claims were all
25 subordinated, as well as, stock options for employees. You

1 have *Med Diversified* which found with respect to employee
2 compensation agreement claims which is essentially what
3 we're also talking about here that those were subordinated.

4 THE COURT: In a decision that I rendered in
5 *Touch America*, I discussed both *Telegroup* and *Enron*. Is
6 there anything in my decision that would weigh against the
7 debtors' position here?

8 MR. KRAKAUER: I haven't found anything in your
9 decision which weighs against our position. I found there
10 are certainly things in your decision which are directly
11 pertinent, I believe, and weigh against the DOL position.
12 Among other things, in *Touch America*, you found that 501 is
13 not limited by who is holding the claim. And the issue
14 there, if you recall, was the claimant's argued that 501 was
15 limited to shareholders asserting claims. And that was also
16 a -- these were claims that were asserted for
17 indemnification and contribution. And they were based on
18 ERISA violations in connection with an ESOP. And the D's
19 and O's came in said we're not shareholders, we're not
20 covered by 501.

21 And this Court looked at *Telegroup* and the
22 principles of *Telegroup*. I remember you looked *Enron* as
23 well and said that's not the way the statute is intended.
24 That's not what other Courts have found. And that, indeed,
25 you looked to the nature of the claim whether it arises from

1 stock and in essence whether it's an attempt to recover for
2 lost value of the stock or for some impropriety based on the
3 acquisition of the stock. And if it is, then it's covered
4 by 501. That's what you indicated was the proper result in
5 *Touch America* and I think it's exactly right. It's
6 consistent with all the other cases out there.

7 Your Honor, the point about subsidiaries I also
8 want to address is that subordination and extinguishment of
9 the claims against the subsidiaries in this case is also
10 absolutely required. Mr. Gerson from the DOL was wrong when
11 he said that we don't -- haven't argued that 501(b) is
12 applicable. 501(b) is applicable. And as I recited at the
13 beginning of this argument, 501(b) applies to claims based
14 on the stock of an affiliate. And here any claims that the
15 DOL has against subsidiaries apart from the other reasons
16 why we would dispute them, we would say even if they had
17 claims, they're based again on ESOP's dealings, ESOP's
18 acquisition and ownership of the Tribune stock and that's
19 the stock of an affiliate.

20 And what 501(b) then says is if you have a claim
21 based on that security and the damages associated with that
22 security, then that claim is subordinated to the same level
23 as such security here, the common stock of the parent. So
24 under 501, you have a very straightforward reading the test,
25 of the text of the statute which says that those claims are

1 simply subordinated to the same level as common stock of the
2 parent company.

3 The one case they cite and I'll -- I'm going to
4 probably butcher the name, but Lesby and Hauck [ph] -- let
5 me look it up, L&H.

6 MR. GERSON: Lerner and Hasbith [ph].

7 MR. KRAKAUER: Lerner and Hasbith, thank you.
8 Which dealt with an issue of claims against a subsidiary and
9 whether they were, in fact, subordinated to those -- the
10 parent claims. It was very different. There the party had
11 independent dealings with the subsidiary. Alleged that the
12 subsidiary independent of any issue related to the stock or
13 damage to the stock had damaged it. And the Court simply
14 found that those independent claims didn't follow the stock.
15 That's not the situation here. Here, the whole nexus is
16 what the ESOP did at the parent and what happened with the
17 stock. So that does not apply.

18 Second, the issue, the next issue is how do you
19 treat -- even if you didn't have 501(b) which is dispositive
20 is there any issue with respect to keeping the equity of the
21 subs owned by the parent in this situation? Does that
22 somehow violate some absolute priority rule? And the case
23 law is that it does not. *Ian Media* which is a case we cited
24 is right on point. It doesn't depend upon the gifting
25 argument. There is a footnote where Judge Pack in *Ian Media*

1 says by the way, I could if I wanted also to justify this on
2 gifted. And as you point out with the recent Second Circuit
3 ruling, at least in the Second Circuit that's more of an
4 issue, but that's not the basis of his holding. That was
5 just an alternative saying that he could find that on that
6 basis as well.

7 The basis of his holding as he says you look at
8 whether or not you have a creditor who is recovering
9 something additional by virtue of keeping the equity in
10 place. And if you're using the stock of the subs to provide
11 something to a creditor that is violative of the absolute
12 priority rule, that's one thing. But if you're keeping the
13 stock in place because your purpose is that it reduces cost,
14 it avoids the unnecessary cost and hassle frankly of
15 reorganizing and starting with all new entities and doing a
16 mirror structure with, you know, spending all the lawyer
17 time and I think we've had enough lawyer time in this case
18 trying to recreate the debtor subsidiary structure and
19 you're doing it as a matter of convenience to keep an
20 existing structure in place because it's an efficient one,
21 that is perfectly fine and that not a violative of the
22 absolute priority rule.

23 And here, that's all that's happening. You have
24 merely a situation where the administrative structure of the
25 various entities is being kept in place because it's an

1 efficient structure. It's not to provide additional value
2 to any other -- to any peer core party. It's just to keep
3 these entities in place rather than going to the cost of
4 creating new ones and mirroring it. What you could do is
5 just be very -- is just an additional cost and expense to do
6 it. So when you look to the purpose of it, *Ian Media* makes
7 clear that that -- you are not violating the absolute
8 priority rule.

9 And then finally, this can also be justified
10 based on simply new value. I mean, there is money coming
11 out of the Tribune parent that's going off that's going to
12 pay for claims against subsidiaries. There's also value
13 coming from the senior lenders that's going to creditors of
14 the subsidiaries and that's all new value and it's perfectly
15 standard and appropriate. It doesn't have anything to do
16 with gifting to provide that in return for that new value
17 given, that the stock is kept by the parent.

18 So I don't believe there's any issue with regard
19 on three different points with regard to keeping those
20 equity interests in place. And it's not violative of
21 anything and it's perfectly appropriate to subordinate the
22 claims against the subs as well.

23 Then I should I also point out that 501(b) is not
24 a discretionary statute. If it applies, then the
25 subordination is mandatory. And there's a number of cases

1 that said that. There's one that came out as recently as
2 January 19 of this year called *Deep Marine* which is a
3 decision by the Bankruptcy Court in Texas and it says
4 exactly that, if 501(b) applies, it has to be applied.

5 So in sum, this is a clear case under a whole
6 range of rulings that these claims must be subordinated and
7 they're -- and they are entitled to subordination under
8 501(b). And there's really no case law out there to the
9 contrary. All the cases are consistent. All the Circuit
10 Courts including the Third Circuit have viewed 501(b) very
11 expansively. And when you get to what all those cases say
12 in terms of its purpose is this a situation where somebody
13 is trying to in essence get a recovery on account of the
14 diminished value of stock? That is what this is about and
15 there's no real dispute about that and 501(b) applies and
16 subordination is appropriate.

17 Then the final point is with regard to
18 exculpation. The provision as Mr. Gerson has pointed out,
19 we did make clear as was originally intended, but we now
20 make absolutely clear, it's only intended to apply to post-
21 petition conduct. The provision with regard to estate
22 fiduciaries which is what the DOL is looking at in terms of
23 officers and employees of the debtor which is where they're
24 focused on is consistent with what we've done. Is
25 consistent with what the Court found appropriate in *PWS*.

1 That's what we based on this provision on.

2 And Mr. Gerson is incorrect in saying that *PWS*
3 only dealt with the proposal -- proposing a plan. The
4 language in -- that was approved in *PWS* said it was
5 appropriate to have an exculpation that was relating to and
6 arising out of the Chapter 11 cases. For basically all
7 conduct relating to and arising out of the Chapter 11 cases
8 by estate fiduciaries. And that's what the provision we
9 have here does provide.

10 Now Mr. Gerson had said that he believes that
11 ERISA provides -- it's a different standard in that it is
12 not legally appropriate or not legally allowed to change
13 that standard in this exculpation. We disagree with that,
14 but what we've done with the exculpation is provide that it
15 applies only to the extent legally permissible. So to the
16 extent that there is an argument is that it is simply
17 unlawful to change the ERISA standard and the exculpation
18 can't do that as a matter of law, that's -- the argument's
19 still there because we're -- we've made the exculpation
20 subject to it being legally permissible. So the Court does
21 not have to find that issue today.

22 Your Honor, I think I've tried to keep this short
23 and to the point just to summarize what our view is. But
24 this is an important issue for allowing the debtor under
25 whatever plan to emerge unencumbered by this claim. It

1 could be a very substantial claim if it's not subordinated
2 and it's very important so I wanted to make sure you
3 addressed it.

4 THE COURT: All right, thank you.

5 MR. KRAKAUER: Thank you.

6 THE COURT: Mr. Gerson, keep your seat. And the
7 reason is that I think if we go to rebuttal on these
8 objections, we will just never get done.

9 MR. DUBLIN: Your Honor, if I may just for one
10 minute. Phil Dublin, Akin Gump for Aurelius and the other
11 noteholder plan proponents.

12 I'd just like to correct something that Mr.
13 Krakauer said on the record just so that everybody is clear.
14 He made the statement that the noteholder plan like the DCL
15 plan, does not provide for any recovery to subordinated
16 creditors. The way our plan operates is that we have trust
17 interests for creditors that are entitled to receive an
18 initial distribution like subordinated creditors who have to
19 turn over anything they would receive or are just not
20 entitled to receive anything until senior creditors are paid
21 in full. So based on the success of the LBO related causes
22 of action, we would expect that subordinated creditors may
23 actually receive a recovery in our cases. I also
24 question whether based on the modifications that have been
25 made to the debtor, committee, lender plan where the now

1 have -- are not releasing the intentional fraud claims or
2 any claims against the Step 1 shareholders other than
3 certain small dollar denomination ones, whether now you may
4 actually come in in their litigation trust causes of action
5 that would likewise be able to flow to subordinated
6 creditors. Thank you, Your Honor.

7 MR. JOHNSTON: Your Honor, Jim Johnston of Dewey
8 & LeBoeuf on behalf of Oaktree and Angelo Gordon.

9 I just wanted to make one observation based on
10 something that we heard for the first time this morning. So
11 I wasn't able to convey my comments to Mr. Krakauer. And it
12 relates to the apparent resolution of the DOL objections to
13 the noteholder plan. As I understood what was read into the
14 record, those objections are resolved by essentially
15 agreeing to kick down the road the dispute over
16 subordination of the DOL claim against Tribune Company with
17 the implication being that all of the claims of the DOL
18 against the subsidiaries go away. I wanted to
19 point out that that essentially drives home one of the
20 points that we make which is that there is no their, their
21 with respect to DOL claims against the subsidiaries. To the
22 extent that there's any claim whatsoever that the DOL
23 asserts, it is subordinated. But more importantly, it's a
24 claim against Tribune, the entity with the ESOP. The entity
25 whose stock is at issue. And I think by agreeing to get rid

1 of the claims against the subsidiaries in the context of the
2 noteholder plan, it really affirms the point that there is
3 no legitimate claim by the DOL against the Tribune
4 subsidiaries. Thank you.

5 THE COURT: Thank you. All right. Shall we turn
6 to Great Banc?

7 MR. GERSON: Your Honor, may I be heard one
8 minute?

9 THE COURT: I'll tell you what, Mr. Gerson, let's
10 do this. Let me -- and I --

11 MR. GERSON: Literally one minute.

12 THE COURT: I may regret this later, but what I
13 may do is permit the objectors to make post hearing
14 submissions, okay? And I'll deal with that at the end of
15 the day today. But I really -- I want to be able to get
16 through these things today.

17 MR. GERSON: Thank you.

18 THE COURT: Okay.

19 MR. RICH: Good morning, Your Honor. My name is
20 Jeffrey Rich. I'm from the firm of K&L Gates and we
21 represent Great Banc as trustee of the ESOP.

22 Your Honor, I'll try and be brief. You've heard
23 -- as you know that the plan provides that securities
24 litigation claims will be extinguished, not subordinated.
25 That is the words of the plan that the DCL proponents have

1 put forth.

2 Without conceding whether or not Great Banc has a
3 securities litigation claim because obviously that is
4 something for another day, Great Banc's objection
5 essentially is that if it is a 501(b) claim by virtue of the
6 statute it has to be subordinated, not extinguished. It may
7 be economically the case that it is remote or extremely
8 remote or maybe even impossible that there will ever be a
9 distribution to subordinated creditors under the DCL plan,
10 but that is not a fact as of today. And 501(b) does not say
11 these claims are extinguished, it says these claims are
12 subordinated. So all that Great Banc is asking is that that
13 section of the plan be revised to say that instead of these
14 claims being extinguished, they are subordinated. And then
15 that really is the argument, Your Honor.

16 THE COURT: Thank you.

17 MR. KRAKAUER: Your Honor, again, Bryan Krakauer
18 for the debtors. I'll make this brief.

19 First, I do apologize to Mr. Dublin. He's
20 correct about what their plan provides.

21 Here, the subordination under the code is to the
22 same level as common stock. There's been -- there has been
23 a lot of testimony in this case about -- presented about
24 what values are and what values of the claims are. And in
25 terms of common stock, what its provided is the common stock

1 is simply extinguished because there's been no showing that
2 there's any value associated with common stock. If Great
3 Banc wanted to come in and show that there was, in fact,
4 value there, they had an opportunity during the evidence
5 phase of this case to do that. They didn't do that.
6 There's no showing that there's value there. And why common
7 stock? We've simply provided that those are going to be
8 extinguished.

9 THE COURT: Sir, is there any confirmed plan that
10 supports your view?

11 MR. KRAKAUER: Any confirmed plan? It's pretty
12 common in confirmed plans to provide that common stock gets
13 extinguished when there's no value.

14 THE COURT: No, I'm talking about specifically
15 with respect to the one remaining objection Great Banc has
16 and that is that it should say subordinated, but not
17 extinguished. It seems to me as a matter of plain statutory
18 reading that that's a fair objection.

19 MR. KRAKAUER: With respect --

20 THE COURT: And, you know, Great Banc
21 acknowledges --

22 MR. KRAKAUER: Yeah.

23 THE COURT: -- as a matter of economics, it may
24 end up being the same thing, but we now don't know that
25 really. And, in fact, if what you're suggesting and I think

1 it is that in every case in which a class is proposed to be
2 subordinated, they've got the burden to come in and give
3 valuation testimony, I will you tell you, I decline
4 respectfully to burden myself with that exercise --

5 (Laughter)

6 THE COURT: -- and anyone else who might be
7 involved.

8 MR. KRAKAUER: Your Honor, it is the case in most
9 reorganizations and this is reorganization, that where you
10 provide for -- when you try -- you provide for who's going
11 to get what in terms of the various classes of
12 consideration, right? And here, we've done that.

13 With respect to the Tribune itself, it's emerging and
14 it's determining what various classes are going to get. And
15 if somebody comes in and says that they are entitled to
16 something, there has to be some evidence in there that
17 there's some value there and there just -- it just isn't
18 here. I do understand your point with regard to the
19 litigation trust which is I think what you're saying which
20 is under our plan. And, you know, that's where end up.

21 THE COURT: Okay. The objection is sustained.

22 MR. KRAKAUER: Okay, thanks.

23 MR. DUBLIN: Thank you, Your Honor.

24 MR. KANSA: Your Honor, this progresses us to the
25 next section where we have objections to both plans. I

1 don't know if you want to break now or progress with the
2 Zell EGI objections?

3 THE COURT: All right. We'll take a ten minute
4 break.

5 (Recess from 11:23 a.m. to 11:35 a.m.)

6 THE CLERK: All rise. Be seated, please.

7 THE COURT: Let's press on.

8 MR. BRADFORD: Good morning, Your Honor. David
9 Bradford, Jenner & Block on behalf of Mr. Zell and EGI-TRB.

10

11 Your Honor, we occupy the next several topics on
12 the agenda. I'm going to address first our objections as to
13 the pursuit of claims against Mr. Zell not being fair and
14 equitable to creditors and why it is a waste of their assets
15 to pursue frivolous claims. I'm also going to address why
16 if those claims are permitted as part of either plan, the
17 exculpation provisions of those plans should be stricken or
18 modified and the restrictions on indemnification for legal
19 fees for existing directors and officers should also be
20 eliminated. And finally, why if those plans are permitted
21 to go forward with claims against Mr. Zell, Aurelius, and
22 the PHONES have conflicts of interest which preclude from
23 acting as litigation trustees with respect to those specific
24 claims.

25 We also have objections that relate for example

1 in Item B1A to the priority of EGI's claims, an objection to
2 the bridge settlement, and objections that I think come
3 later in the agenda under the topics of creditor trust
4 related to the 346(e) priority issue in the bar order.

5 It's our understanding that those objections will
6 be addressed later because they're part of a group of
7 objections where others will also be appearing, but that I
8 together with my partner, Cathy Steege who will address the
9 issue of priority of EGI's claims, will address everything
10 that is in Items B1 and B2A at this time and then we'll move
11 further down the agenda if that's agreeable to the Court.

12 THE COURT: That's fine, I just have on request.
13 You mentioned at the beginning of your statement that you
14 wanted to address why claims, alleged claims don't have any
15 merit. I would say spend no time on that. And by saying
16 that, I don't tell you that I think they have merit, I know
17 we have a hearing scheduled at some time in the future on
18 the standing issue, but that's not an issue for now as far
19 as I'm concerned.

20 MR. BRADFORD: If I might just be heard briefly
21 on why we believe it's an issue for now Your Honor.

22 THE COURT: Certainly.

23 MR. BRADFORD: With respect to the -- both plans,
24 each of them effectively seek to finance and fund their
25 plans on the basis of claims that are being asserted. The

1 claims against Mr. Zell which are the subject of -- there is
2 no pending standing motion I should say. We do have a
3 motion that's coming up in the future where we have
4 attempted to serve a Rule 11 motion and that's been objected
5 to on the grounds that the stay precludes even the service
6 of a Rule 11 motion. But independent of our effort to at
7 least effectuate service of a Rule 11 motion, we have
8 nothing on the horizon that is going to address that claim.

9 Your Honor may recall that the issue as it
10 pertained to standing was addressed by the committee
11 withdrawing its request for confirmation of standing. So
12 they withdrew that motion entirely. We think that's
13 indicative of their desire to avoid a resolution of whether
14 these claims are in the best interest of the estate, whether
15 they're colorable, and whether they survive Rule 11. And
16 that those issues need to be addressed at some point and
17 that ultimately they go to whether or not it's in the best
18 interest of creditors, including EGI-TRB which is a
19 substantial creditor to spend estate money, deplete the
20 estate insurance policies on claims that the examiner not
21 only found lacked merit, found highly unlikely to succeed in
22 critical part, but that as Your Honor heard, Professor Black
23 opined had no value and no merit --

24 THE COURT: Okay. Mr. Bradford, stop, please
25 stop there.

1 MR. BRADFORD: Sure.

2 THE COURT: You've come up and your colleague has
3 come up repeatedly to tell me the same thing. I do not need
4 to hear it again. I know what your position is, believe me.
5 I was unaware and maybe it could be that in the course I was
6 asked to sign an order and just don't remember it, that that
7 issue had gone away in terms of standing. So that's my
8 miss, not yours. But I don't want to get into the merits
9 again. Mr. Sottile?

10 MR. SOTTILE: Your Honor, I rise only because the
11 issue with respect to standing has not gone away as I
12 understand it. As the Court will recall, the Court granted
13 standing to the committee to pursue claims against Mr. Zell
14 and EGI-TRB back in October. When the committee filed an
15 amended complaint as the Court will recall, the committee
16 also filed a motion to confirm that the claims asserted and
17 the amended complaint fell within the scope of the original
18 order.

19 THE COURT: Yeah, and I thought that was
20 unresolved.

21 MR. SOTTILE: It was resolved without objection
22 as to all parties other than those represented by Mr.
23 Bradford.

24 THE COURT: No, that I remember.

25 MR. SOTTILE: And then ultimately, in part in

1 response to the Court's suggestion when -- after the motion
2 and confirmed standing was filed, we withdrew the motion to
3 confirm standing without prejudice. To be absolutely clear,
4 it's the committee's view that the Court has already granted
5 standing as to these claims.

6 THE COURT: Okay.

7 MR. SOTTILE: And that the motion to confirmation
8 standing was unnecessary. The Court should not take the
9 withdraw as anything more than taking something off the
10 table we did not believe was necessary.

11 THE COURT: No, I was just thinking that I had --
12 I remember saying that I was not going to consider the issue
13 before confirmation. And I think we had set a hearing date
14 at some point in the future, I just didn't remember when
15 that was, but thanks for bringing me up to date.

16 MR. SOTTILE: Thank you, Your Honor.

17 THE COURT: Okay.

18 MR. BRADFORD: Yes, Your Honor, just to complete
19 the record on that. When we filed our plan objections, that
20 motion was scheduled for hearing and we incorporated that
21 motion into our plan objection. So it was our understanding
22 that this issue would be taken up at confirmation. We
23 understood our objection to confirmation would be the
24 vehicle for doing that. We're happy to --

25 THE COURT: I'm not overruling any part of your

1 objection at this point and I'm not suggesting that you need
2 or should have abandoned it. All I'm saying is I don't need
3 to hear oral arguments on it.

4 MR. BRADFORD: I understand, Your Honor.

5 THE COURT: So that you're clear. Okay.

6 MR. BRADFORD: I understand. If I might, Your
7 Honor, then I'm going to turn to specific provisions in the
8 plan which we think provide inadequate safeguards against
9 frivolous litigation. And I'll try to restrain my remarks
10 insofar as they boil over to the particulars of these
11 particular claims, but one of the key concerns we have is
12 the exculpation clause. The exculpation clause has in it a
13 provision that essentially as we read it would exculpate
14 litigation trustees from liability and circumstances where
15 they have acted in good faith in a reasonable understanding
16 of their authority.

17 We note with respect to Rule 11, that Rule 11
18 does not turn on the subjective good faith of a
19 professional, it's an objective standard. It turns on
20 whether there is an objective basis for the claims. We have
21 and the record reflects that this will before the Court at
22 the omnibus on the 25th, moved to modify the stay or
23 objected to the extension of the stay so that we could
24 proceed on a Rule 11 motion.

25 We do think there are Rule 11 violations in

1 certain of the claims that have been asserted against Mr.
2 Zell and to permit a plan to exculpate professionals from
3 their Rule 11 liabilities is unprecedented and would not in
4 any way further the general interests of exculpation in
5 protecting individuals who have been involved in the
6 formulation of a plan. The conduct of the litigation trust
7 and the conduct of a litigation is a separate animal from
8 the issue of the litigation of the plan itself. And
9 certainly there is no basis to exculpate professionals to
10 the extent that there have been Rule 11 violations or if in
11 the future, Rule 11 violations are committed in connected
12 with the pursuit of these claims.

13 As a second and related matter, we object to the
14 provisions in the plan which effectively provide limitations
15 on indemnifications of directors and officers with respect
16 to the LBO claims. We have cited to the Court in our
17 objection three cases, two recent cases from Delaware; the
18 *Summit* case, the *Pamalum* [ph] case, and the *Crabtree* case
19 from the Southern District of New York holding that articles
20 of incorporation are executory contracts.

21 Here we have articles of incorporation which
22 provide indemnification for the directors. And as a
23 consequence of that under *Sharon Steel* they must either be
24 accepted or rejected in whole. What the debtor can't do or
25 either plan can't do is essentially pick piecemeal where

1 it's going to provide indemnification for legal fees and
2 where it is not. And that's what the plan proposes to do by
3 providing and recognizing the articles insofar as they
4 provide indemnification rights for legal fees in all
5 circumstances but for the LBO claims.

6 The debtor or DCL plan proponents I should say in
7 response cite two cases that suggest that articles of
8 incorporation are not executory. Neither of them dealt with
9 Delaware articles of incorporation. The *Baldwin* case comes
10 out of Ohio and involved a circumstance where
11 indemnification was permissive, not mandatory as it is in
12 Delaware and where the directors had already done their
13 service. Mr. Zell by contrast is still currently a
14 director. So he has been induced to continued service and
15 does continue service in reliance upon the articles of
16 incorporation.

17 Certainly, when someone has completed their
18 service, someone may make the argument that the situation is
19 not longer executory insofar as that director can no longer
20 breach their contract. But as to a director who continues
21 their services, there is an executory situation and either
22 the contract and the bylaws in this case, articles of
23 incorporation must be accepted in whole or rejected in
24 whole. There is no proposal and should be none to reject
25 them in whole.

1 Similarly, the one other case cited by the DCL
2 proponents here the *THC* case is a 1977 Hawaii case where the
3 directors had already served in the past. And the Court
4 there specifically preserved the right to seek
5 indemnification for legal fees as an administrative claim.
6 So there should be no basis to limit our right to
7 indemnification for legal fees, if these claims go forward
8 to a claim in the context of the unsecured claim
9 administration. There should be an ongoing right to
10 indemnification that continues independent of the claim
11 process.

12 And to the extent that litigation is being
13 brought here and it's frivolous or unsuccessful there is no
14 reason that a sitting director should be denied their right
15 to both advancement and payment of legal fees to the extent
16 not otherwise provided by insurance. And the insurers are
17 taking positions such as there's a \$25 million deductible
18 and so forth. So there can be no reliance completely on DNO
19 insurance. And I believe this is ultimately important as
20 well because it goes to why the estate ultimately could be
21 injured by the pursuit of claims because ultimately there
22 should be indemnification costs to the estate from the
23 continuation of that litigation.

24 The final point that I would turn to in terms of
25 objections to the plans insofar as they pertain to the

1 pursuit of litigation and then I'll ask Ms. Steege to
2 address the issue of priority and the bridge settlement is
3 related to the conduct of the litigation trust. And I
4 should note, Your Honor, that each of these objections, that
5 is our specific objection on indemnification exculpation on
6 the conduct of the litigation trust would be moot if, in
7 fact, these claims could not go forward. Whether that would
8 be for standing or Rule 11 or other reasons. And so the
9 Court need not reach any of the issues I'm addressing today
10 if, in fact, the claims against Mr. Zell are not permitted
11 to go forward, they would become moot.

12 The history of this case illustrates precisely
13 why neither of the parties and I would focus specifically on
14 Aurelius or the PHONE, should be in a position of
15 controlling any litigation trust decisions that relate to
16 whether or not claims against Mr. Zell specifically should
17 be allowed to be pursued.

18 Your Honor will recall that prior to the
19 appointment of the examiner in this case, there was an
20 investigation of claims. It was done first by debtor and
21 then by the UCC starting in May of 2009 and including by the
22 Zuckerman firm starting in August of 2009. It's been
23 represented to the Court that there were some 30 witnesses
24 interviewed, 4.5 million documents reviewed. And following
25 that investigation, there was a determination that there was

1 no basis for claims against Mr. Zell as reflected by the
2 fact that a plan was put forward to this Court that was
3 accepted by the creditors' committee, accepted by
4 Centerbridge, accepted by JP Morgan, Angelo Gordon, and Law
5 Debenture to had a release for Mr. Zell. And your heard Mr.
6 Gropper testify, he had no objection to that plan at that
7 time.

8 So what happened? And what happened, I believe
9 demonstrates why typical safeguards against frivolous
10 litigation are not sufficient here and why the individuals
11 who have now elected to include claims against Mr. Zell have
12 incentives to do so which are unrelated to the best interest
13 of creditors and should disqualify them from continuing to
14 serve in that capacity going forward. And that is as Your
15 Honor knows and I won't get into the merits.

16 The examiner came in and among other things, the
17 examiner vindicates Mr. Zell. At the same time, what that
18 does is change the dynamics of this bankruptcy. Two things
19 happen. Aurelius buys the PHONES position. And Aurelius
20 decides that it now has a plan that is going to generally
21 pursue litigation and it wants to be in a position to attach
22 any settlement plan put forward by the DCL proponents.

23 And as a consequence of its acquisition of the
24 PHONES position, Aurelius gains an interest in trying to
25 subordinate the EGI-TRB notes. That's a direct economic

1 interest that they have. Ms. Steege will address the issue
2 of subordination between those two. But suddenly, Aurelius
3 has an interest in saying well Mr. Zell must have done
4 something wrong because that would provide us a basis for
5 subordinating a competing creditor who is otherwise ahead of
6 us in the food chain here. And that coupled with the fact,
7 they seize on the fact that Mr. Zell's long time advisor,
8 Mr. Liebentritt whose integrity I would say could not be
9 challenged by anybody in this courtroom is the general
10 counsel in Tribune and he becomes the chief restructuring
11 officer of Tribune. And so isn't a convenient that if we
12 can tar Mr. Zell as the architect of some great LBO
13 conspiracy, we can claim that everybody on the other side of
14 the courtroom has a conflict of interest.

15 And you continue to hear that song played, Your
16 Honor. And the fundamental fault with that whole argument
17 obviously is that there is no viable claim here. Anybody
18 independently who looks at it has seen there is no viable
19 claim. But Aurelius has demonstrated that for reasons
20 related solely to the rhetoric and desire to promote its own
21 plan and advance the economic interest of the PHONES
22 position that it purchased, it has an incentive to try to
23 put Mr. Zell into the role of an LBO defendant when there is
24 no basis to do that. They cannot make an objective
25 disinterested determination about whether that's in the best

1 interest of creditors.

2 THE COURT: Let me ask you to pause for a moment.

3 MR. BRADFORD: Sure.

4 THE COURT: Yes, Mr. Golden?

5 MR. GOLDEN: Excuse me, I'm sorry. Your Honor, I
6 tried to patient here. I don't like to be interrupt when
7 I'm making a speech. I thought it was very clear based upon
8 a lot of communications with the Court that today was
9 reserved for legal objections to be raised by third parties
10 not including legal objections by the DCL's or the
11 noteholder plan proponents. It is equally clear listening
12 to Mr. Bradford that he is not relying on solely legal
13 objections. He is I'm not sure what the evidentiary record
14 that he's tried to establish is based upon. I don't believe
15 it's the testimony that we've heard over the last twelve
16 trial days, but these are not based on legal objections.

17 And so I don't have to keep getting up and
18 sitting down to make this objection, I was wondering if we
19 could get some clarification from the Court as to whether we
20 are -- whether all the parties today are confined to making
21 legal based objections or are we now expanding that into
22 some kind of evidentiary basis upon which I don't know what
23 the basis is.

24 THE COURT: Well, as I understand it, Mr.
25 Bradford is arguing that a litigation trust controlled by

1 Aurelius and I understand what the dynamics are there
2 between the advisory board and the trustee and we did get
3 into that this week, I think. But arguing that you're
4 legally ineligible to be an estate fiduciary. I mean,
5 that's the essence of it. So I don't know how else -- Mr.
6 Bradford, if I'm wrong correct me.

7 MR. BRADFORD: That's correct, Your Honor.

8 THE COURT: Okay. I -- so I'll allow you to
9 continue.

10 MR. BRADFORD: Thank you, Your Honor.

11 THE COURT: But again, as a general proposition,
12 Mr. Golden is right. We're here today to talk about
13 objections which are based on the law, not tied to an
14 evidentiary record.

15 MR. BRADFORD: And so the record we believe
16 reflects and this I don't believe gets into evidence, but
17 the proceedings before this Court even prior to the start of
18 the confirmation hearing when Your Honor will recall that
19 what Aurelius proposed to say in its disclosure statement
20 about its plan and I quoted this to the Court previously,
21 I'll quote it again. Aurelius claimed shortly after the
22 examiner report vindicating Mr. Zell, "The examiner's report
23 put an end to 20 months of cover up. It exposed flagrant
24 wrongdoing within Tribune's executive ranks and identified
25 billions of dollars of LBO related actions, many of them

1 against Tribune insiders such as Sam Zell who's close
2 business associate is Tribune's chief restructuring officer
3 that would have been released for free under the prior
4 plan." And clearly, that was a false statement as it was
5 put forward. And Your Honor required that they excise that
6 from the disclosure statement.

7 But the theme persists which is we have to tar
8 Mr. Zell as a wrongdoer and bring claims against him
9 notwithstanding that every independent party who has looked
10 at this has said there is no basis for doing so, so that we
11 can contend that there's a conflict of interest on the other
12 side of the courtroom.

13 And then you've heard it throughout this case,
14 well you happen to know Mr. Zell, that must make you
15 ineligible to act in good faith. And I know Your Honor has
16 seen through many of those aspersions and attacks on
17 people's good faith and these purported conflicts of
18 interest, but this is a vestige and surely Aurelius in the
19 role that it's in with an ownership interest in the PHONES
20 with a very clearly announced position that this
21 relationship of anybody to Mr. Zell disqualifies them from
22 being independent in this case because of their claims
23 against Mr. Zell give them incentives that are different
24 than looking out for the best interest of creditors and
25 should disqualify them from acting in a role of litigation

1 trustees.

2 THE COURT: Well some might argue that's exactly
3 the kind of party you should have chasing such claims for
4 the very reasons that you described.

5 MR. BRADFORD: If, in fact, there motives were
6 not restricted to getting the PHONES put ahead of for
7 example EGI-TRB, but there are a whole host of other
8 creditors ahead of them. There are a whole host of parties
9 who depend upon the distributions from this plan. And there
10 is nobody before this Court who has other than obviously the
11 examiner who had no interest in proposing a plan, there's
12 nobody before the Court who has the best interest of the all
13 the creditors in mind. And if you look at why
14 are we not hearing from the DCL proponents that it makes no
15 sense to pursue this litigation, I think you've heard them
16 through their own expert say they don't believe this
17 litigation has value. They don't believe this litigation
18 has merit, but they don't want to be accused of being soft
19 on Mr. Zell because they're being accused of having this
20 conflict. They're put in the position of responding by
21 saying well, we'll sue him, too. Let's have a party and see
22 who can find more claims to assert against Mr. Zell so we
23 don't have a conflict of interest either.

24 And you, therefore, have this incentive on the
25 part of Aurelius to triumph the PHONES position over EGI-TRB

1 and to construct a conflict when none exists as a motivation
2 for bringing claims that otherwise don't meet the best
3 interest test, don't meet the Rule 11 test, and you have DCL
4 proponents who are put in the defensive and say we'll do
5 whatever Aurelius will do by way of suing people so nobody
6 can accuse of being soft on the LBO claims.

7 There is nobody who has been an independent
8 decision maker and that's all we're asking for is an
9 independent trustee without those kind of specific creditor
10 oriented incentives, incentives that are unique to
11 particular creditor positions instead of in the best
12 interest of all creditors. And we would submit Professor
13 Black who was the proponent for the DCL or the expert for
14 the DCL proponents on the value of the claims, spoke for
15 them when he testified that there was no value to these
16 claims and that these claims did not have merit.

17 THE COURT: Well what mechanism would you suggest
18 to locate and appoint such a person?

19 MR. BRADFORD: I believe Your Honor could appoint
20 someone as you appointed the examiner. I also believe that
21 we could allow the examiner essentially to serve in that
22 capacity with respect to the issue of what claims should be
23 permitted and what claims should not be permitted. And
24 there should be some threshold determination --

25 THE COURT: So you think it would be a -- the

1 examiner who's determined that claims against your client
2 have no merit would be a fair arbiter of determining whether
3 such claims should be pursued?

4 MR. BRADFORD: Yes, Your Honor, I absolutely do
5 and I believe that's why Your Honor appointed the examiner
6 in the first place. He came to this proceeding with no
7 independent -- with no interest to promote any particular
8 plan with no agenda other than trying to get at the truth.
9 As Your Honor knows, \$12 million of estate money was spent
10 to get at the truth. And if somebody can come forward and
11 rebut what he has shown, that's certainly a determination
12 for Your Honor to make. But in the absence of some evidence
13 as to why the examiner got it wrong, that's a pretty good
14 starting point for what is in the best interest of the
15 estate.

16 In the *Maxwell* case, Judge Posner specifically
17 held that any time you have a litigation by trustee, a
18 similar situation with a litigation trust, the incentives
19 are fairly skewed. Insofar as it's very easy to say this is
20 a large claim. It may have a fractional change of success,
21 but what's the harm in pursuing it? And Judge Posner wrote
22 and other Courts have followed the same reasoning.

23 We've cited these opinions that the Court needs
24 to exercise some gate keeping function over that. That
25 specifically those expenses that are not reasonably in the

1 best interest of the estate should not be permitted. That
2 Rule 11 should be applied with some vigilance and that was
3 the same ruling that the Court reached in *Adelphia* in saying
4 I'm not going to give releases, but on the other hand, I'm
5 going to apply Rule 11 in a meaningful sort of way. Because
6 the parties don't have the usual incentives that private
7 parties do in making their decisions about whether to spend
8 money on litigation or no. And as a result, there needs to
9 be some gate keeping mechanism for someone independent of
10 those trying to persuade creditors that they're going to get
11 the biggest bank and the largest recovery regardless of how
12 specious or frivolous the claims to make that decision.

13 There needs to be Rule 11 determinations. We
14 have tried to T up a Rule 11 motion. I will be back in two
15 weeks to try to get that before Your Honor. We can
16 certainly try to raise these issues again by way of
17 standing, but what I'm speaking to today really are the
18 institutional safeguards against the pursuit of frivolous
19 litigation. And one of those safeguards should be a part
20 that is truly independent and objective of valuating whether
21 or not these claims are in the best interest of these
22 estate.

23 Ultimately, I believe that's Your Honor's
24 determination, but to the extent that someone is going to
25 look at that before Your Honor rules on it, I do think that

1 is a role that the examiner has played. That was one of the
2 reasons I believe the examiner was engaged in this case and
3 that his work should not be discounted.

4 So to summarize, specifically, we object to the
5 indemnity provisions that would deny ongoing legal fees in
6 this circumstance. We object to the exculpation provision
7 particularly insofar as it would curtail Rule 11 liability.
8 And we would ask that as it pertains to the issue of whether
9 claims against Mr. Zell specifically because I do think his
10 circumstances are unique by reason of the examiner's
11 findings and confirmed by Professor Black's testimony,
12 whether those claims should be pursued, that that is an
13 issue that should be made by an independent party and
14 hopefully the Court would address it in the context of
15 standing on Rule 11 before we got that far.

16 THE COURT: Well he's presently a defendant in
17 the lawsuit that's currently stayed. Why shouldn't that be
18 resolved in connection with the adversary matter?

19 MR. BRADFORD: We don't -- we believe it can be
20 resolved in connection with the lawsuit by way of an early
21 Rule 11 motion and that's precisely how we've tried to
22 address this. What we don't think is appropriate is to
23 leave this claim pending for any greater length of time
24 because there are I believe unfounded allegations that are
25 reputationally injurious and we have a stay in that lawsuit

1 that essentially allows these allegations and promises of
2 recovery to made without affording a real chance to respond
3 to that in the litigation.

4 THE COURT: Well what if the plan were to be
5 neutral and leave to resolution of those issues to
6 disposition of the adversary?

7 MR. BRADFORD: First, we again, believe that all
8 Rule 11 issues should be preserved, indemnity rights
9 brought, and then we would still submit that the question of
10 whether or not any estate money should be spent on those
11 claims is a threshold issue for this Court. That whatever
12 cost there is in that motion practice is needless cost.
13 Whatever waste there is of the DNO policies is needless.

14 And I think most importantly, that this Court has
15 some obligation not to put its imprimatur on lottery ticket
16 litigation. And that's what Judge Posner held that it's not
17 enough to say that will get sorted out somewhere down the
18 road in litigation. If it's going to be part of a plan that
19 this Court approves and sanctions, that there needs to be
20 some judgment made about whether that's really a fair and
21 equitable expenditure of funds. And that at least requires
22 that the claims not be frivolous, that they meet Rule 11
23 standards, colorability standards, best interest standards.
24 And that's a determination that should be made as a gate
25 keeping function before the litigation is allowed to go

1 forward. And in that sense, we think it makes more sense
2 for Your Honor to address those issues early on as we've
3 sought to do in responding to the standing motion at an
4 earlier time.

5 THE COURT: So we should have the hearing that we
6 never had.

7 MR. BRADFORD: That's correct, Your Honor.

8 THE COURT: I tend to disagree with that. At
9 least at the confirmation stage, but I -- look, I hear your
10 concerns. I've heard them all along.

11 MR. BRADFORD: I appreciate that, Your Honor.

12 THE COURT: And I, you know, I understand your
13 client's position. Okay. Anything further?

14 MR. BRADFORD: Not on these specific aspects of
15 our objection. As I mentioned, there are what I would call
16 more discrete objections which go to the issue of the
17 priority of treatment of EGI-TRB under the plan, the bridge
18 settlement. And then there are some other objections that
19 will come later in the agenda. It was my expectation that
20 Ms. Steege, my partner, would address those other
21 objections. I know it's close to the lunch hour and I don't
22 know how Your Honor would like to proceed.

23 THE COURT: Well let's go a little while longer,
24 I'm building up a great appetite.

25 (Laughter)

1 MR. BRADFORD: Right. I'm going to ask Ms.
2 Steege to address those issues.

3 THE COURT: Thank you.

4 MR. BRADFORD: Thank you, Your Honor.

5 MS. STEEGE: Good morning, Your Honor. Catherine
6 Steege on behalf of the EGI-TRB.

7 And the first issue I am going to address is the
8 question of the priority of the EGI-TRB notes. EGI-TRB
9 holds approximately \$300 million in notes against the
10 Tribune. We have -- the class, the EGI-TRB class has voted
11 no on the plan triggering the cram down provisions of
12 Section 1129(b) which require that the plan satisfy the
13 absolute priority rule. We would submit that neither the
14 DCL plan nor the noteholder plan satisfies that rule because
15 neither plan makes it clear that the EGI-TRB notes are
16 senior to the PHONES securities.

17 In response to this objection, the DCL plan
18 proponents state in the chart that they filed last week that
19 they really don't think that the issue needs to be resolved
20 today. They point to a statement made in their confirmation
21 memo filed before the hearing begin which states that if and
22 when there are funds available to distribute to either of
23 these two classes, then the issue of who's entitled to those
24 funds can be determined at that point in time.

25 The problem with that resolution, well that

1 resolution might be acceptable, the problem is is that Your
2 Honor's not going to be confirming their confirmation brief.
3 What Your Honor is going to be confirming is a plan or
4 reorganization and entering a confirmation order. And the
5 plan itself is not clear in this respect. It does not
6 reserve the issue. It doesn't really address the issue,
7 right on its face, one would read that the two sets of the
8 notes and the PHONE securities are being treated as if they
9 are equal claims and equal priority.

10 THE COURT: Or some other Court of competent
11 jurisdiction --

12 MS. STEEGE: Or you resolve it.

13 THE COURT: -- could decide that issue, too.

14 MS. STEEGE: Right. But another Court of
15 competent jurisdiction is going to want to see that it's
16 clearly been expressively preserved in a confirmation order
17 and in a plan, not in a brief that's filed prior to
18 confirmation that doesn't really -- doesn't itself get
19 approved by the Court. So that is our position with regard
20 to the subordination, absolute priority rule objection.
21 With regard to the objection that we've made, we've made an
22 objection, a narrow objection, to the provisions of Section
23 9.12 of the DCL plan. And when the bridge lenders withdrew
24 their plan and came on board with the DCL plan, changes were
25 made to the plan which provided that the bridge lenders

1 would be reimbursed for their fees and expenses up to I
2 believe under the current amendments it's \$7 million, but
3 they only get those payments if they support the DCL plan
4 and take no positions inconsistent with confirmation of the
5 plan. In short we think that this is an inappropriate, not
6 to be pejorative, but it's basically a bribe. There's no
7 basis in the bankruptcy code to allow the bridge lenders
8 reimbursement for their fees and expenses. They're not a
9 secured creditor that's over-secured that's entitled to
10 collect that under Section 506(b), simply because they
11 withdrew a plan. That's not a substantial contribution. No
12 one is suggesting it is under Section 503(b). In their
13 chart of objections they say well, they've resolved one
14 objection by making Your Honor have approval of the
15 reasonableness of those fees. That's a start, but there's
16 no legal basis to be giving them fees in the first place.
17 And we would submit that that particular provision of the
18 plan is inappropriate and that this allowance of fees for a
19 creditor who is not entitled to it should not be confirmed.

20 THE COURT: Well, let me ask the question as
21 carefully as I can articulate it. What makes this proposal
22 different from what I find is a common dynamic in bankruptcy
23 proceedings and that is a party who wants something,
24 bargaining for the other party's acquiescence or
25 cooperation? What makes this different?

1 MS. STEEGE: What makes it different, Your Honor,
2 is the creation of a claim for this party that they would
3 not otherwise be entitled to under the code. The code
4 specifically provides for reimbursement of expenses and fees
5 to certain creditors if they're secured and they're over-
6 secured under Section 506(b). It might allow for recovery
7 of expenses under 503(b) if a party has made a substantial
8 contribution. But the case law is pretty clear that
9 proposing your own plan, withdrawing your own plan, these
10 are things you're doing for your own benefit, not for the
11 benefit of the estate as a whole and you don't get a
12 substantial contribution claim. There's no basis in the
13 code to provide this type of claim to induce their
14 cooperation. That's different than reaching an agreement
15 over a claim that the code would allow to be paid under a
16 plan, agreement you're going to pay a creditor a certain
17 percentage amount on their claim in exchange for their
18 support of your plan, you're dealing with a claim the code
19 recognizes. Here you're creating something out of whole
20 cloth simply to get their support to go on board. They
21 should support the plan or not, but they shouldn't be doing
22 it because they're going to get \$7 million in fees for doing
23 so. Then every single other creditor that the debtor wants
24 to induce could come in here and say I want my fees paid,
25 too, and there's no legal basis for that and that's why it's

1 wrong. Thank you.

2 THE COURT: Thank you.

3 MR. SOTTILE: Your Honor, James Sottile of
4 Zuckerman Spaeder, Special Counsel to the Official Committee
5 of Unsecured Creditors. Mr. LeMay of Chadbourne will be
6 addressing the legal points raised by Jenner Block, Counsel
7 for Mr. Zell and EGI-TRB.

8 I rise to ask the Court's indulgence to speak for
9 two or three minutes about those arguments by Mr. Bradford
10 that I think went a little beyond the legal objections that
11 he was presenting, in particular arguments about what
12 happened on standing and when claims should be pursued and
13 what Determinations were made about the merits of claims.

14 THE COURT: You can do that in two to three
15 minutes?

16 MR. SOTTILE: I believe that I can, Your Honor.

17 THE COURT: Go ahead.

18 MR. SOTTILE: Your Honor, let me just say what --
19 where we fundamentally disagree with Mr. Bradford. There
20 was no Determination by any of the parties that agreed to
21 the April settlement that there was no basis for claims
22 against Mr. Zell or EGI-TRB. There was simply a settlement
23 under which for the consideration given at the time and
24 based on what the parties knew at the time, they were
25 prepared to release those claims. Nobody decided there was

1 no basis for them. Mr. Bradford told the Court that the
2 examiner vindicated Mr. Zell and suggested that the
3 examiner's conclusions show that claims against Mr. Zell
4 have no merit and are frivolous. None of that can be found
5 in a fair reading of the examiner's report, Your Honor, as I
6 know the Court will conclude when it reviews the report in
7 detail. The examiner found that various claims were
8 reasonably unlikely to succeed, somewhat unlikely to
9 succeed, and so forth with respect to Mr. Zell and EGI-TRB.
10 I submit, Your Honor, that's the stuff of litigation.
11 Litigators all the time pursue and win claims that one might
12 look at at the beginning and say you know less than 50/50,
13 but you have a real chance of success. That's all one can
14 fairly infer from what the examiner found. It is for some
15 Court down the road that's hearing the merits of these
16 claims to determine whether or not those claims will succeed
17 or not.

18 You also heard Mr. Bradford allude to testimony
19 by Professor Black, an expert speaking on behalf of the DCL
20 plan proponents about value of the claims against Mr. Zell.
21 I want to be very clear, Your Honor, that Mr. Black's views,
22 Professor Black's views about the merits of claims against
23 Mr. Zell and associated entities are not the view of the
24 Committee. The Committee believes that those claims have
25 substantial merit and should be pursued.

1 Finally, Your Honor, I would submit that the
2 right way to deal with these issues, this sort of attempt to
3 pre-litigate in the Bankruptcy Court the merits of claims
4 that ought to be resolved later on in the adversary
5 proceeding, to litigate that as part of confirmation
6 hearings is inappropriate. The claims have been asserted,
7 the actions are stayed, they should remain stayed until the
8 Court concludes these confirmation proceedings, at which
9 time they're going to end up in some litigation trust. The
10 Trustee of that trust can make a Decision as to whether or
11 not the claim should be pursued. This Court can review that
12 Decision and can entertain motions to dismiss and can
13 ultimately deal with the merits of the claims. It's not a
14 confirmation objection.

15 THE COURT: Well, let's assume for the moment,
16 without deciding, that you then agree that the plan should
17 be neutral with respect to any rights Mr. Zell or related
18 entities should be able to assert in the adversary. Are
19 there changes that should be made in the proposed plans to
20 make that clear?

21 MR. SOTTILE: Your Honor, I don't believe that
22 anything in the plan that the DCL proponents have submitted
23 to the Court purports to limit in any way Mr. Zell's and
24 EGI-TRB's ability to litigate fully the merits of claims.
25 And if Mr. Bradford believes there is something, they should

1 point it out to us because we are not intending to have this
2 Court in confirming a plan, make a Decision about whether or
3 not those claims will ultimately succeed or not or whether
4 or not the litigation trust that will be prosecuting the
5 claims should pursue them. We believe they are avowed and
6 meritorious claims, but ultimately the Decision about
7 whether to pursue them is one the litigation trust should
8 make without the plan telling them one way or the other how
9 they should proceed.

10 THE COURT: All right. Thank you.

11 MR. SOTTILE: Thank you, Your Honor.

12 MR. LEMAY: Good morning. Good afternoon, Your
13 Honor. David LeMay from Chadbourne and Parke of the
14 Official Committee of Unsecured Creditors. The Zell and
15 EGI-TRB attorneys have given me a number of things that I
16 guess I should deal with. With the Court's permission I'm
17 going to proceed in not exactly the order that they did. I
18 think I'll first address the two arguments made by Ms.
19 Steege with a view of getting in effect clearing out the
20 underbrush because I don't believe it's any more than
21 underbrush. First with respect to the relative priority of
22 the DCL plan on the one -- I'm sorry -- of the PHONES notes
23 and the EGI-TRB notes as between each other, at least as it
24 relates to the DCL plan. I believe that the DCL plan is
25 extremely clear that it does not purport in any way to

1 resolve that relative priority dispute. If you look at the
2 definitions in Section 1.1.42 and 1.1.43 of the DCL plan,
3 those define the Class 1L litigation and Class 1L creditors
4 trust interests, which are the distributions to be received
5 on the EGI-TRB notes. And what they say is that essentially
6 they're going to get these litigation trust distributions
7 and then it goes on with a proviso to say that until the
8 holders have allowed senior note claims on the one hand and
9 there's no dispute as to that and then B, the holders of any
10 other allowed claims that are entitled to share in the
11 parent trust -- the parent GUX [ph] trust preference and to
12 the benefit of the contractual subordination of the EGI-TRB
13 notes receive payment in full, then the EGI-TRB notes will
14 not receive any distribution. So that definition
15 intentionally and purposefully leaves open the relative
16 priority as between those subordinated notes and the PHONES
17 subordinated notes. I think Your Honor should decline any
18 invitation to take on that issue now, both because you've
19 got an awful lot else on your plate, but just because
20 there's no good reason to do it and indeed I have a strong
21 suspicion that ultimately it will prove not to be as much of
22 a dispute as people are suggesting it might be, for the
23 simple reason that I don't think there's anything there to
24 fight about. Your Honor will remember that colloquy that
25 happened at the January 24 hearing when Mr. Rosenberg, on

1 behalf of the PHONES holders or a subset of the PHONES
2 holders, very candidly told the Court that he didn't think
3 that -- he said it is very unlikely the PHONES -- I'm
4 quoting now -- that the PHONES are going to be able -- are
5 going to see a significant recovery here, if any recovery at
6 all. And of course the indenture trustees counsel for the
7 PHONES wanted to unsay that and I had some fun with it. But
8 I think it is an open secret in this courtroom that the
9 subordinated classes are probably quarreling about nothing.
10 So for all those reasons, Your Honor, I would urge the Court
11 not to reach out and attempt to bite off this unnecessary
12 issue of the respective priority of these two subordinated
13 classes. I think our plan is perfectly clear that it
14 doesn't purport to prejudge that issue and if people -- if
15 the Court wants, I should say, for us to make that clearer
16 in bold print or somewhere else, I don't see any reason we
17 wouldn't do that. So I think that's a phony issue in
18 effect, Your Honor.

19 THE COURT: Well, then if it's so easy to make it
20 go away, why not just make it go away?

21 MR. LEMAY: We could add a sentence to our plan.

22 THE COURT: All right.

23 MR. LEMAY: I don't see any reason we couldn't do
24 that. With respect to the bridge loan settlement, I'm kind
25 of amused you know. That is the one aspect of what we've

1 done that the noteholders and Aurelius actually have not
2 taken us to task on. If the bridge settlement was such a
3 rotten deal and was giving away money that ought not to have
4 been given, I'm quite confident that these gentlemen over
5 here would have called our attention to it. They didn't do
6 that. In fact, their most recent supplemental filing seems
7 to suggest that they'd be willing to embrace the bridge
8 settlement itself. It's actually a pretty good settlement.
9 We settled a billion six of potential liability for \$64.5
10 million or approximately four percent of the total. A
11 portion of that is in effect stated to be on account of
12 legal fees, it is stated to be subject to the Court's
13 approval, so I think we've met the Court approval
14 requirement that's come out of some of the recent case law
15 here, but I think the way to look at it is the way that Your
16 Honor looked at it in your question to Counsel, which is in
17 effect what we're doing is settling this \$1.6 billion claim
18 for \$64.5 million. A portion of it is allocated under the
19 settlement to legal fees. I think that is more of interest
20 to the bridge proponents than -- I'm sorry -- to the bridge
21 lenders than to the DCL proponents. I think the way to look
22 at it is what did the estate get from this and of course
23 what the estate did get was that the bridge reserve, the
24 initial amount of \$77 million satisfied that settlement and
25 left money left over, I think it was about \$13 million, I'm

1 subject to correction on that, left money left over to be
2 distributed to the bondholders and to the parent GUX. So I
3 think all in all that was a very good settlement and I think
4 Your Honor hit the nail on the head when you suggested that
5 this is just how claims get resolved in the attribution of a
6 portion of that consideration, subject to your Court -- to
7 Your Honor's approval to legal fees I think is just not
8 problematical. I think that really is more of an internal
9 kind of scorekeeping mechanism within the bridge community
10 itself. So those issues I think, Your Honor, should come
11 off the table relatively quickly.

12 I'm going to turn now to some of the things that
13 Mr. Bradford talked about. I was perplexed -- well, first
14 as to the inadequate safeguards against frivolous
15 litigation. I think we've all heard Your Honor pretty
16 clearly. Mr. Sottile has made that remark. You know it's -
17 - it should not come as a surprise that there is a spotlight
18 on Mr. Zell, I mean and I'm told that in naval circles when
19 a ship sinks out from under a captain, there's usually an
20 inquiry and here, if I may use one of my famous analogies,
21 Mr. Zell and his colleagues designed and built a ship and
22 they launched it and they commissioned it and they put a
23 crew on it and it sailed about 100 yards into Lake Michigan
24 and sunk to the bottom of the ocean, it is hardly surprising
25 that they are the subject of attention from lawyers under

1 those circumstances. Mr. Sottile has explained to you that
2 I don't think the plan puts any undue levers on that
3 process. I'll address exculpation and indemnity in that
4 context because I think those are the undue levers that Your
5 Honor may have been questioning about when you asked your
6 question and I hope I got that right.

7 So let me turn to the indemnity and exculpation
8 questions that have been raised by Mr. Bradford. First as
9 to the exculpation, I think that's an easy one and it is a -
10 - it's a textural one. The relevant text is Section 11.5 of
11 the DCL plan and it basically sets forth an exculpation
12 starting with the words to the fullest extent permitted
13 under applicable law, which is an interesting way to start
14 because I think it gives the Court and all parties comfort
15 that in effect it is self-regulating. If, as Mr. Bradford
16 suggests, this paragraph otherwise might have been deemed to
17 somehow write Rule 11 out of the bankruptcy rules and I
18 don't think it does that at all, I think that savings clause
19 at the beginning should totally take care of that. But I
20 think the real substance of the exculpation makes it very
21 clear that nothing that's being done by way of exculpation
22 does the horrible things that are being advertised.

23 THE COURT: Let me --

24 MR. LEMAY: Yes.

25 THE COURT: -- suggest to you how I have from

1 time to time dealt with the exculpation/release issues with
2 such proposed savings language and it leaves for another
3 time and probably more often than not for another Court,
4 just what the extent of that -- of those clauses should be
5 and I don't know, at least in one case recently I declined
6 to approve that language because while sometimes it's good
7 to kick the can down the road, sometimes it's just not the
8 right thing to do. Why is it the right thing to do here?

9 MR. LEMAY: I think it's the right thing to do
10 because and this was where I was going to go with this, the
11 exculpation clause in this plan was intentionally and pretty
12 narrowly tailored to measure up to Judge Walrath's recent
13 Decision in the Washington Mutual case. I think it was no
14 secret to any of the parties that that would be on
15 everyone's mind and Your Honor confirmed that yesterday when
16 you told us to think pretty hard about that. This
17 exculpation clause looks quite a bit different from the one
18 that we filed with the initial plan and that initial plan
19 was pre Washington Mutual and this is post Washington
20 Mutual. We've done our very best to make sure that the
21 exculpation clause for example only protects, at least as to
22 the estate fiduciaries, only protects us to post-petition
23 conduct because that's a Washington Mutual Decision, that
24 the related parties definition, as you'll hear later, falls
25 within the ambit of the sorts of exculpations that would be

1 appropriate. So Your Honor, I totally agree. If we had
2 written an exculpation clause that was completely off the
3 reservation and then said to the fullest extent permitted by
4 applicable law, then I think that would be a very, very
5 valid criticism from the bench. Why should I have to do
6 this? But I think here and I know you've asked the parties
7 to address this tomorrow, the exculpation clauses really
8 weren't just sort of you know thrown down the field. They
9 were really written with a view of passing muster and we
10 think they do. I don't myself see anything in this
11 exculpation clause to bring it back to the argument that's
12 in front of the Court right now. I don't see anything in
13 here that says litigation trustees are going to be
14 exculpated from Rule 11 violations.

15 MR. GOLDEN: Your Honor, I might save some time
16 just by clarifying the scope of our objection. Thank you.
17 Our objection is not to 11.5 which is being referred to, but
18 we're referring specifically to 13.3.7, which deals with
19 exculpation of the litigation trustee and those responsible
20 for the litigation and I apologize if I caused any confusion
21 about the scope of the objection.

22 THE COURT: All right. Thank you.

23 MR. LEMAY: Actually don't know that that's an
24 exculpation clause, Your Honor. I think that's an
25 indemnification from the litigation trust in favor of the

1 litigation, the litigation trustee and to the extent that
2 the litigation trust as opposed to the Chapter 11 estate is
3 indemnifying and to the extent that there isn't a Court-
4 ordered exculpation, I think that's a pretty different
5 creature. Basically what this is just saying is that the
6 litigation trust will indemnify the litigation trustee.
7 That just doesn't seem like a very remarkable proposition to
8 me. If the litigation trust wastes its assets by violating
9 Rule 11, then what that means is the litigation trust and
10 the creditors who empowered that litigation trust are going
11 to have to eat their own cooking. So I'm not sure that that
12 -- I'm not sure that one makes any sense. I think there'd
13 be a more cogent objection if either A, you were being asked
14 to use your judicial powers to craft an exculpation or B,
15 the debtor or its reorganized estate were being put on the
16 hook for that. So I'm not sure that's a well-taken point.
17 I think I've beaten that one to death, Your Honor. I'll
18 keep going.

19 I think the last thing I need to talk about,
20 unless I've got my notes wrong, is indemnity. And I guess
21 the argument that's being made is that Mr. Zell has been
22 induced post-petition to remain as a director and that
23 because he's been induced it is wrong to treat his pre-
24 petition indemnity claims as pre-petition indemnity claims.
25 And some cases were cited that purport to stand for that. I

1 have a couple of observations. I don't think it's quite
2 right to say that Mr. Zell was induced to remain as a
3 director. I suspect that he has remained as a director for
4 the purpose of exerting, as is perfectly proper, ongoing
5 control over the reorganizing entity until the time comes
6 when he'll circle off the board. But the fact remains, I
7 think it's beyond peradventure that when acts are committed
8 by an officer or director pre-petition, those acts give rise
9 to pre-petition claims. A case called Summit Metals decided
10 by Your Honor, makes it very clear. And this is a decided
11 case. This is not just one of the sort of confirmation
12 orders, which I'll get to in a minute because I think that
13 was what was adverted to by Mr. Bradford. In Summit Metals,
14 in the decided case and it's reported at 379BR40, this Court
15 has said consistently Courts have held that an
16 indemnification claim based on pre-petition services or
17 conduct is not a cost or expense for services rendered after
18 the commencement of the case. Putting it a different way,
19 pre-petition conduct gives rise to pre-petition claim and
20 gives rise not to an administrative claim because you have
21 not been dealing with the debtor in possession. You've been
22 dealing with the pre-petition debtor and no benefit has been
23 conferred upon the estate. The suggestion is made that
24 however charters and bylaws are executory contracts and must
25 be assumed or rejected. I think if the Court looks at our

1 briefing, you'll see that that's just not necessarily the
2 law and the fact that the holdings that say that that isn't
3 the law emanate from other jurisdictions, I don't really
4 think is dispositive. And so for those reasons I don't
5 think it can be said in any meaningful way that these are
6 executory contracts that have to be assumed. I think that's
7 contrary to the weight of the law. And the Baldwin United
8 and THC cases that Mr. Bradford mentioned I think continue
9 to be good law. Mr. Bradford cited three confirmation
10 orders for the proposition that certificates of
11 incorporation are executory contracts. He mentioned
12 Panolam, Crabtree & Evelyn and then I think he mistakenly
13 mentioned the Summit Metals case. I believe he meant to
14 mention because his papers mention a case instead called NII
15 Holdings. And I guess the only observation I have with
16 respect to those three cases is that they are simply
17 confirmation orders, they do not appear in any way to have
18 been the result of a litigated decision, and I think that
19 they're precedential value for that reason should be limited
20 or probably discounted entirely. Excuse me. Your Honor, if
21 I could just have a second. They did cover a lot of topics
22 and I just want to make sure that I don't repent of yielding
23 the podium.

24 THE COURT: You may.

25 MR. LEMAY: Thank you. I know Mr. Dublin wants

1 to have a word or two about some of the observations in
2 particular that were made with respect to Aurelius as
3 litigation trustee nominator, so I think I'm done. Your
4 Honor, thank you.

5 THE COURT: Thank you.

6 MR. DUBLIN: Good afternoon again. For the
7 record Phil Dublin, Akin Gump on behalf of Aurelius and the
8 other noteholder plan proponents. Your Honor, I'll do my
9 best not to repeat the comments that either Mr. Sottile or
10 Mr. LeMay have made. I think Mr. Sottile put it quite
11 succinctly and accurately as to what the examiner's report
12 does say and what it doesn't say and that Mr. Bradford I
13 believe reads that report with rose-colored glasses that I
14 wish I had in connection with all my matters.

15 With respect to the last couple of items that Mr.
16 LeMay touched on, the indemnity and the exculpation, again I
17 believe the provisions being referred to in the plan, as
18 well as in the related draft trust agreements are indemnity
19 provisions, not exculpation provisions. With respect to the
20 trusts under the noteholder plan, those provisions I believe
21 are consistent with much precedent and applicable law and
22 they carve out the extent of the indemnity to make sure that
23 parties can only be indemnified to the extent of applicable
24 law and likewise provides that there will be no
25 indemnification upon a finding of fraud, self-dealing,

1 intentional misrepresentation, or willful misconduct. And
2 on the heels of that discussion on the indemnity
3 specifically focused on self-dealing is where I'd like to
4 move into the attacks on Aurelius. And I'll do it briefly
5 because I think that the only reason why Mr. Bradford was
6 focused on Aurelius is because he knows that they have the
7 weight of their conviction. They know that there are valid
8 claims here with respect to Step 1 and Step 2, as well as
9 with respect to the preference claims and the like that are
10 asserted against Mr. Zell and EGI in connection with the
11 Committee complaint that's on file, which this Court has
12 already granted standing. And really it's an attempt by EGI
13 and Zell to try to get Aurelius to say hey, we really want
14 to be involved in these causes of action, we want to be on
15 the board, so we'll drop these claims against you because
16 we're scared. That's not the case. As Professor Rock
17 testified, these are the exact type of people that you want
18 to be in charge of your trust, people that are going to
19 maximize the value of the assets. And in that regard in
20 addition to the indemnification provision that's limiting in
21 the trust agreements, our trust agreements provide that the
22 members of the trust advisory boards, as well as the
23 trustees, will have fiduciary obligations to maximize the
24 value of the assets in the trust, the staten [ph] way, and
25 with those fiduciary duties in the same manner that a

1 creditors committee has to its constituency. We do have a
2 specific carve out because under our plan everybody is going
3 to get trust interest, that there will be no fiduciary duty
4 in your capacity as a member of the advisory board or as
5 trustee against any trust beneficiary in that trust
6 beneficiary's capacity as a defendant. Obviously that is
7 what would create the conflict of interest if you had a
8 fiduciary duty to somebody in their defendant capacity. Mr.
9 Bradford goes out of his way also to say that Aurelius is
10 really just focused on the PHONES and assuming I guess as we
11 all believe that the senior notes are entitled to a full
12 recovery, that Aurelius will continue to press the causes of
13 action once the senior notes are paid in full, but I don't
14 think he's read our plan. Once the senior notes are paid in
15 full, the PHONES notes trustee takes over Aurelius'
16 position. Anybody that's been appointed by Aurelius on the
17 board is gone. It's the PHONES notes trustee that takes
18 over at that point. Aurelius does not have a say after the
19 senior notes are paid in full as to how that board will
20 continue to operate.

21 THE COURT: I'm not so sure Mr. Bradford would
22 consider that an enhancement of his position.

23 (Laughter)

24 MR. DUBLIN: That is probably true, but it will
25 no longer be Aurelius that will have a say in the

1 prosecution of those causes of action. Moving on also to
2 priority argument with respect to the PHONES and the EGI
3 notes. I'll talk about it just for a minute and I think our
4 plan is quite clear where it says that it's going to be
5 determined at a later date with respect to whatever allowed
6 claims there are as to who has priority against the PHONES
7 and that is in, if you give me one second I'll tell you the
8 exact -- I think it's in 3.9C. It's in the treatment
9 section for the PHONES. But it's really a red herring.
10 There are no initial distributions going out under the
11 noteholder plan to the holders, the PHONES notes, or the
12 EGI-TRB notes for the specific purpose that we all agree --
13 they are all subordinated to Step 1, Step 2, the bridge, and
14 the senior notes at the parent company. Now if the LBO
15 causes of action are successful, well, then the EGI-TRB
16 notes are going to go away. They're Step 2 debt. So we're
17 not going to have to worry about whether the EGI-TRB notes
18 are senior to the PHONES because they won't be there. If
19 the LBO causes of action are unsuccessful, well, then
20 there's not going to be any value for the PHONES or the EGI-
21 TRB notes in that circumstance, so we don't have to worry
22 about it at that point. So I think it's really a red
23 herring as to whether the PHONES or the EGI notes are
24 senior, which is senior to each other or whether even
25 they're pari passu. I think that the order of reading if

1 the Court -- if this Court or any Court is eventually going
2 to determine which is senior, the PHONES or the EGI-TRB
3 notes to the extent that is ever necessary, which again I
4 say it is not -- the right order is to read the PHONES
5 notes, indenture trust -- indenture first, followed by the
6 subordination agreement for the EGI notes because the
7 language that Counsel for EGI-Zell read from the PHONES
8 indenture is strikingly similar to the language that's in
9 the subordination for the EGI notes, which provides that the
10 EGI notes will be subordinate to all senior obligations and
11 senior obligations are all obligations, indebtedness and
12 other liabilities of the company, meaning Tribune company,
13 other than any such obligations, indebtedness, or
14 liabilities that by their express terms rank pari passu or
15 junior to the company's obligations under the subordinate
16 notes. There's nothing in the PHONES notes that say
17 anything about the EGI notes because the PHONES notes trust
18 indenture came first and by the fact that this agreement
19 came second, if they wanted to be senior to the PHONES, they
20 would have said so, but they didn't, so I think that is the
21 proper order to read them in.

22 I think I may have covered everything that was
23 necessary here. I'm just going to take a quick look as
24 well. One more second, I believe I have -- that's all I
25 have.

1 THE COURT: All right. Thank you.

2 MR. SIEGEL: Martin Siegel of Brown Rudnick on
3 behalf of Wilmington Trust, the indenture trustee for the
4 PHONES. Much of what I was going to say, Your Honor, has
5 been said. I incorporate Mr. Dublin's argument. We don't
6 believe if you read -- if you were to decide the issue that
7 you would decide that when in 2007 when the EGI note was
8 prepared and they said we're only senior basically -- you
9 have to say that you're going to be subordinated. They
10 could have amended the PHONES if they wanted to, they could
11 have said so in the EGI subordination agreement. They
12 didn't. We think if you ruled on it, you would rule that
13 the PHONES are not subordinated to the EGI note. However,
14 we agree that you do not need to decide the issue now, the
15 way the plans are written, we're not entitled to a
16 distribution at the -- right now.

17 Now we've heard more than two weeks of testimony
18 and we disagree with Mr. LeMay's statement that we will
19 ultimately not get a substantial distribution. But that's
20 for a later date. Your Honor has enough on his plate, so on
21 behalf of the indenture trustee, we are not insisting that
22 you resolve this issue now. When Your Honor enters a ruling
23 on the other issues that you have before you, we believe
24 that at that point there will be a need to resolve it
25 because the PHONES will get a substantial distribution. But

1 that's not for today. You have enough to decide.

2 THE COURT: Well, as I sit here and listen to the
3 respective arguments, I recall an argument that was made on
4 a similar issue and I think it was in Spansion. And there
5 the plan changed in its terms with respect to dealing with
6 the priority issue and one version of the debtors plan said
7 well, we'll issue stock in accordance with whatever the
8 priority turns out to be, but we make no position -- take no
9 position about it now and one party argued therefore I have
10 no jurisdiction to determine the dispute about who came
11 first. Then the plan changed and made a choice about who
12 came first, so I think I put the issue squarely before me,
13 which I had to decide. So I then ruminated about whether
14 here depending upon the valuation decision, which I have to
15 make in connection with confirmation, would mean that
16 depending on the number I would have to decide the issue,
17 but if it's not high enough I might not have to until later
18 or another Court might not have to until later, depending
19 upon the success of the litigation outcomes. Okay.

20 MR. SIEGEL: Your Honor, if you'd like to decide
21 another issue, we'd be more than happy to submit whatever
22 you -- how you want to do it.

23 THE COURT: Yeah. I've run out of my invitation
24 stationary, Mr. Siegel.

25 (Laughter)

1 MR. SIEGEL: Thank you, Your Honor.

2 THE COURT: All right. Is this an appropriate
3 time for a break?

4 MR. SOTTILE: Yes, Your Honor.

5 THE COURT: Okay. Mr. Sottile?

6 MR. SOTTILE: Yes, Your Honor?

7 THE COURT: I'd like to ask you to revisit now
8 your time estimate on getting through these objections and -
9 -

10 (Laughter)

11 THE COURT: -- whether we're still on track or
12 whether there might have been a bit of slippage.

13 MR. SOTTILE: Actually, Your Honor, I believe
14 that we are on track. We had anticipated that this
15 morning's objections would be rather lengthy and I still
16 anticipate, although I will look around and make sure that
17 I'm not going to be corrected by any of my colleagues, I
18 still anticipate we should complete today. I think that we
19 are optimistic, Your Honor, that we can continue and
20 complete the third party objections today.

21 THE COURT: Listen, any time a little optimism
22 sneaks its way through in this case I'm happy. In terms of
23 numbers of hours, what do you think?

24 MR. SOTTILE: Your Honor, my best estimate would
25 be that we need another three to three and a half hours.

1 THE COURT: Okay. Anything before we break?

2 Court will stand in recess until 2:00.

3 (Recess from 12:49 p.m. to 1:59 p.m.)

4 THE COURT: Good afternoon.

5 MR. BRADFORD: Your Honor, David Bradford on
6 behalf of Mr. Zell. Briefly a point of order before we
7 leave this last objection. Over the lunch hour a Bloomberg
8 Report issued with a headline which read, "Claims against
9 Tribune Chairman Zell 'have merit' bankruptcy judge says."
10 Your Honor is then quoted as having found that the claims
11 against Mr. Zell have merit. I'm confident that Your Honor
12 made no such Determination. I would ask Your Honor to
13 clarify for the record that you made no such Determination.

14 THE COURT: The record will speak for itself. I
15 do not make a habit of responding to press reports for
16 reasons which I'm sure you understand.

17 MR. BRADFORD: Your Honor, I do think -- I will
18 state for the record and I've consulted with other Counsel
19 that no such statement was made by the Court, that the issue
20 of whether these claims have merit was not before the Court
21 today and that there was no such Determination. So I think
22 unfortunately this illustrates why we are trying to get this
23 issue resolved sooner rather than later because there are
24 serious reputational consequences to these kinds of
25 unfounded articles. Thank you, Your Honor.

1 MR. LANTRY: Kevin Lantry on behalf of the
2 Debtors, Your Honor. This now brings us to the last of the
3 third party objections to both plans and that has to do with
4 contentions about the creditor trust structures that are in
5 both plans and EGI indicated they'd like to fall back a
6 little bit, so the foundations I believe have the first
7 objection on this.

8 THE COURT: Very well.

9 MR. RILEY: Good afternoon, Your Honor. Richard
10 Riley from Duane Morris on behalf of the Robert McCormick
11 Tribune Foundation and the Cantigny Foundation, which I'll
12 refer to as the foundations.

13 Your Honor, you heard some of our argument at the
14 March 22 hearing in connection with the foundations
15 objection to the noteholders motion for determination that
16 they retained their state law fraudulent conveyance claims.
17 This will -- our arguments will amplify a little bit of what
18 we said at that hearing, Your Honor. I don't think there's
19 any dispute among the parties as to what the intent and the
20 motivation is for the creation of the creditor trust under
21 both of the plans. The Committee has already sued the
22 foundation and other former shareholders for -- to try to
23 recover shareholder payments made as part of the 2007 LBO
24 under an intentional fraudulent conveyance theory. The
25 Committee intentionally did not sue the foundation and the

1 other shareholders, the other former shareholders, under
2 constructive fraudulent conveyance theories. So under both
3 plans the only thing being assigned or conveyed to this
4 creditor trust is these state law fraudulent conveyance
5 actions. As I'm sure Your Honor is aware, the Third Circuit
6 has found that you know these shareholder payments like the
7 payments that the foundations have received, are protected
8 by 546(e) under -- if they're brought under by a trustee for
9 constructive fraudulent conveyance. Given the 546(e)
10 limitations, the plan proponents have concocted the creditor
11 trust mechanism under each of the competing plans, simply to
12 try to evade 546(e) of the Bankruptcy Code. In doing so,
13 Your Honor, the foundations assert that the creditor trust
14 provisions of the competing plans violate 1129(a)(1) and
15 (a)(3) of the Bankruptcy Code. We have two main reasons,
16 Your Honor. First is somewhat duplicative of what we argued
17 back on March 22. By assigning the -- trying to assign the
18 creditors state law fraudulent conveyance claims to this
19 creditor trust --

20 THE COURT: Do you mean unsuccessfully argued on
21 the 22nd?

22 MR. RILEY: Well, Your Honor, I guess -- the
23 issue I guess -- that's a point of clarification I guess. I
24 guess some of us, me included, are unclear of what was
25 actually ruled on at -- on March 22.

1 THE COURT: I have to say that ruling from the
2 bench set a record for confusing others involved.

3 MR. RILEY: Yeah. Because as you know, Your
4 Honor, there's competing certifications to Counsel, I
5 believe --

6 THE COURT: Oh, I know.

7 MR. RILEY: -- based on that ruling.

8 (Laughter)

9 MR. RILEY: What we say is that the creditor
10 trust mechanism under the plan is trying to confer standing
11 on the creditor trustee to bring these state law fraudulent
12 conveyance actions, but Your Honor they've -- the Committee
13 has already brought an action for -- to recover the payments
14 under the -- for this LBO under fraudulent conveyance
15 theories. And once the Committee brought that action,
16 that's the action. The creditors no longer have standing to
17 bring the state law actions. And Your Honor, for that
18 proposition we cite in our objection the National American
19 Insurance Company v. Rupert Landscaping case. And in that
20 case the Court found that a creditor could not bring a
21 similar cause of action to an action that the trustee was
22 bringing where the actions had the same similar focus. And
23 Your Honor if you think about it, if this creditor trust
24 mechanism were to be approved and go into effect, you will
25 have competing causes of action for the same dollars arising

1 out of that LBO transaction.

2 THE COURT: You're right. That was the same
3 argument that was made and I thought I was clear in that to
4 the extent that was an objection and I had overruled it as -
5 - for the reasons that as certain parties argued that's just
6 something to be sorted out later and Courts have a way of
7 dealing with that and they do.

8 MR. RILEY: Well, Your Honor, then I'll move on
9 to the -- I guess you're saying that's overruled. The
10 second reason we contested --

11 THE COURT: Well, you know Mr. Riley if you can
12 tell me -- you quite properly acknowledged at the outset
13 that it was like the objection that was made before, which I
14 thought I'd overruled. But I see no difference in the
15 argument here either.

16 MR. RILEY: Well, our position is since the
17 Committee has commenced the action, you're going to have
18 competing causes of action for the -- for basically the same
19 dollars. It's going to be a --

20 THE COURT: I acknowledge that that might be a
21 possibility.

22 MR. RILEY: And Your Honor, I do point out that -
23 - where is it -- in the Klingman [ph] case, which is one of
24 the cases cited by the noteholders for the proposition that
25 once the two year statute of limitations under 546 for the

1 trustee expires, that the creditors regain or can assert
2 these causes of action, but the Klingman Court actually said
3 -- it's an apt quote. It says this holding should not be
4 construed as suggesting that creditors may vie with the
5 bankruptcy trustee for the right to pursue fraudulent
6 conveyance actions. To the contrary, the commencement of a
7 bankruptcy case gives the trustee the right to pursue
8 fraudulent conveyed assets to the exclusion of all creditors
9 and they cite 546(a) and they -- but they say however the
10 trustee does not retain this exclusive right in perpetuity,
11 the trustees exclusive right to maintain a fraudulent
12 conveyance cause of action and the creditors may step in or
13 resume actions when the trustee no longer has a viable cause
14 of action. And in this case the Committee has brought a
15 viable cause of action for the return of the shareholder
16 payments. So our argument would be with that they don't
17 have standing to bring them and it's going to cause all
18 sorts of problems after the plan is confirmed.

19 THE COURT: Well, I acknowledge that the
20 potential exists, but as I said and as was argued before
21 Courts have a way of dealing with that and the noteholders
22 also had a notion that it might help prompt resolutions and
23 I tend to think they're right about that.

24 MR. RILEY: Your Honor, the other reason we state
25 that the creditor trust would violate or would not be

1 brought in good faith under 1129(a)(1) or (a)(3) is that our
2 position is that 546(e) of the Bankruptcy Code preempts the
3 state law fraudulent conveyance actions and the creditor
4 trust mechanism is just a clear attempt to sidestep 546(e).
5 And Your Honor, I would cite to you the Hechinger's Decision
6 by Judge Walrath, which I'm sure you're aware of, in which
7 she found that 546(e) preempted an unjust enrichment claim
8 that sought to recover you know under similar theories as
9 fraudulent conveyance.

10 THE COURT: Well, it came up in a different
11 context, but the Third Circuit decided recently in Visteon
12 that the enhanced protections given to employee benefits by
13 Section 1114 was intended by Congress and it did actually
14 offer more than arguably was available outside of
15 bankruptcy, which is somewhat unusual as the interplay
16 between bankruptcy and non-bankruptcy law typically goes.
17 Here what in effect is maybe happening is that while there's
18 the protection in bankruptcy, after bankruptcy maybe it's
19 not and maybe that's what Congress intended.

20 MR. RILEY: But Your Honor --

21 THE COURT: Tell me why that's not a fair reading
22 of the code.

23 MR. RILEY: Well, Your Honor, I think Congress
24 intended to protect the exact kind of transaction that's
25 trying to be unwound here. I mean if you look at what

1 Tribune is trying to do, the noteholders or the debtor
2 committee lender plan is trying to do, they're trying to
3 unwind billions of dollars of securities transactions that's
4 going to involve thousands if not ten thousands of
5 shareholders. If you look at the Committee complaint as an
6 example of what will be the state court litigation, I think
7 the Committee complaint, the caption goes on for at least
8 two pages and it has a -- close to a 500-page exhibit of
9 additional plaintiffs. And Congress in passing 546(e) was
10 trying to give some certainty to the financial markets that
11 these types of transactions couldn't be unwound. So Your
12 Honor, it's just that this whole mechanism is --

13 THE COURT: Or maybe that bankruptcy couldn't be
14 used to unwind them.

15 MR. RILEY: Or once a company decides to file
16 bankruptcy, they cannot unwind them. And I don't think it
17 stops with confirmation. Once the debtor decides to file
18 bankruptcy, 546(e) applies.

19 THE COURT: Forever.

20 MR. RILEY: Yeah. And Your Honor, I think
21 there's joinders.

22 THE COURT: All right.

23 MR. RILEY: I do have one last point, Your Honor.
24 We do mention in our brief or our objection that these same
25 arguments were actually raised by the Debtor to the

1 examiner, so they were -- they knew that preemption was an
2 issue and they knew that this attempted sidestep would be
3 problematic.

4 THE COURT: Well, it wouldn't be the first time
5 I've seen a position change during the course of a
6 bankruptcy.

7 (Laughter)

8 MS. STEEGE: Good afternoon, Your Honor.
9 Catherine Steege again on behalf of EGI-TRB and Mr. Zell.
10 I'd like to answer Your Honor's question with regard to why
11 this isn't a circumstance where parties ought to be allowed
12 to proceed outside of bankruptcy and evade some restrictive
13 provisions of the Bankruptcy Code. The reason for that,
14 Your Honor, is because the estate made a Determination to
15 administer these particular claims. By making that
16 Determination, by bringing the actual fraudulent transfer
17 claims and the other claims that implicate 546(e), they've
18 administered that particular body of claims. They've chosen
19 to proceed in the bankruptcy process and creditors should
20 not be allowed to then proceed outside of bankruptcy on the
21 parallel claims. And I think the problem with how everyone
22 is focusing on this is they're defining claims by looking at
23 the legal label that's placed on the claim. They're saying
24 if we call it this it's something different than if we call
25 it that, but that's not how the law works in any other

1 circumstance. If you were, for example, looking at whether
2 or not res judicata or issue preclusion would apply, you'd
3 be looking at the core set of operative facts and the core
4 set of operative facts with regard to the causes of action
5 that the estate, through the Committee's complaint has
6 brought, that same core set of facts, the same ultimate
7 relief is being attempted to be sought in connection with
8 these claims that would be assigned to the creditor trust.
9 As to the question as to why it's appropriate to resolve
10 that issue now as opposed to letting it be deferred until a
11 later date, the issue before the Court today isn't whether
12 or not Aurelius gets relief from the stay to bring causes of
13 action in its own name. It's whether the Court enters a
14 confirmation order that places an imprimatur on creditors
15 abilities to assign into a creditor trust these particular
16 claims. And I'm not suggesting, because I don't think it's
17 correct, that you can't have a creditor trust in a plan.
18 You can. You can have a trust for claims that are assigned
19 by creditors that they own. The question here is do
20 creditors actually own any claims that can be assigned into
21 that trust and you can only get there if you determine that
22 the claim depends solely on the legal label placed on that
23 claim. If you look at it the way I think it's looked at
24 every other time when you try to figure out, when you're
25 amending a claim under Rule 15, you're applying res

1 judicata, you look at the core set of operative facts. When
2 you look at it that way, the estate chose to administer
3 these claims and by administering these claims, creditors
4 lost the right to individually pursue those claims outside
5 of bankruptcy. And that's the reason why this mechanism
6 doesn't work in this plan. And if you look at the cases
7 that both of the plan proponents cite to support this, they
8 are all instances where the bankruptcy trustee, the estate,
9 doesn't administer at all the fraudulent conveyance claims,
10 doesn't do anything with that core set of operative facts.
11 And after they don't do anything for the two-year period,
12 creditors then come in, they revert back, they're abandoned
13 back, and they're allowed to proceed. But you don't see any
14 case where anyone is jointly on a parallel track prosecuting
15 that with a trust that's got the imprimatur of the Court.
16 And I don't think it's appropriate. It's one thing in the
17 stay motion. It's another thing when you have a
18 confirmation order to suggest that a Court in some other
19 jurisdiction is going to be able to raise that issue because
20 what will be said is the Court confirmed the plan allowing
21 the assignment of those claim, it made a Determination that
22 there was something to assign, so the argument that I'm
23 making today shouldn't be made because the confirmation
24 order borrows it and it's a collateral attack on the plan.
25 That's why I think it becomes ripe here where it may not

1 have been a few weeks ago when it was argued in connection
2 with the stay relief. Thank you, Your Honor.

3 THE COURT: Thank you.

4 MR. DOUGHERTY: Good afternoon, Your Honor. My
5 name is George Dougherty. I'm here on behalf of certain
6 current and former officers and directors of the Tribune.
7 Mr. Riley covered a lot of what I wanted to cover and EGI's
8 Counsel also did the same and I certainly heard what you
9 said. I do want to point out that at least from our
10 perspective, 546(e) shows Congress's clear intent that these
11 types of transactions, those that involve securities
12 transactions, should be protected. The plan proponents I
13 think need to show you why that is not the case in this
14 situation and I don't think they've made that burden and
15 it's not what you said a forever thing. I think the way to
16 reconcile this issue is to say that the claims that existed
17 at the time the bankruptcy was filed and these disclaim
18 state law fraudulent conveyance claims clearly existed at
19 that time, that they should be subject to the 546(e) issue.
20 And that you know perhaps there's claims outside of
21 bankruptcy that may come later. Maybe we don't get those
22 protections under 546, but with respect to the things that
23 could have been brought under -- is it 547 or 548, I forget
24 which one, those are claims that should be covered by 546
25 because that's the only way you can fulfill a clear

1 congressional determination that these types of claims
2 should not be upset under a state law or a constructive
3 fraudulent conveyance theory and thank you.

4 THE COURT: Thank you.

5 MR. DUBLIN: Good afternoon, Your Honor. Phil
6 Dublin, Akin Gump for Aurelius and the Noteholder Plan
7 Proponents. I'll be brief because I think Mr. Golden
8 covered on March 22 substantially all of the issues that
9 have been addressed by the objecting parties so far this
10 morning. I would just like to note that we obviously
11 disagree with all their positions. But as far as for one
12 clarification, EGI-Zell made the point that creditors don't
13 own these claims and only if they have valid state law
14 claims can they transfer them to a trust. That's exactly
15 what our plan says. Our plan says that creditors that are
16 going to get credit or trust interests will only be entitled
17 to receive creditor trust interests to the extent they have
18 valid state law avoidance claims that can be transferred to
19 that trust. And that -- whether there are valid state law
20 claims that can be transferred to that trust is something
21 that will be determined by the state court overseeing the
22 litigation, that will likely be commenced prior to
23 confirmation of any plan in these cases as we come up to the
24 June 4 statute of limitations period for certain states.
25 And all of the arguments that the objecting parties have

1 raised with respect to 546(e) and standing and the like,
2 those are defenseless claims. There's nothing in the plan
3 that's seeking to prevent those parties, just like there was
4 no relief being sought on March 22 seeking to prevent those
5 parties from pursuing those defenses in connection with any
6 litigation commenced by an individual creditor or by any
7 causes of action that a creditor trust may pursue on behalf
8 of creditors that have contributed to that trust the valid
9 state law avoidance claims that they have.

10 Other than that any remarks I have will be
11 repetitive of the hearing that we had on the 22nd and the
12 rulings that you made. Obviously we do have competing
13 orders. We view that as a fact that we have objecting
14 parties that are trying to add things into an order that
15 this Court did not rule, but we'll wait to see the order
16 that's eventually entered.

17 THE COURT: Thank you.

18 MR. LEMAY: Your Honor, David LeMay from
19 Chadbourne and Parke for the Official Committee of Unsecured
20 Creditors and also for the DCL proponents. Counsel for the
21 foundation began his remarks by saying that some of his
22 arguments had previously been ventilated on the 22nd. I
23 don't think that was quite right. I think all of this was
24 previously ventilated and what we really have here is the
25 second pre-motion to dismiss and I think that the correct

1 time to be arguing motions to dismiss is on the motion to
2 dismiss.

3 I will note, just very briefly, that there are
4 two or three legal authorities that you don't hear too much
5 about from the other side in this quarrel. One is the PHP
6 case, which you did hear about on the 22nd. You heard about
7 it from Mr. Golden. And the PHP case I think makes it very
8 clear and that's a Delaware case of course, that if the
9 claim that is being pursued is not being pursued by the
10 estate or by a successor to the estate, then the 546(e)
11 defense isn't applicable. Now I assume there will probably
12 be an argument sooner or later about whether the 546(e)
13 defense -- I'm sorry -- whether the claim is being pursued
14 by the estate or by the -- by a successor to the estate.
15 Taking a cue perhaps from a couple of the suggestions that
16 the Court made this morning to first Mr. Krakauer and then
17 to me, for our part, the Committee's part, we'd be perfectly
18 happy to add a sentence to the plan that says as such 546(e)
19 defenses as may exist, if any, are not impaired or are not
20 prejudiced. And if that makes this go away, that's maybe a
21 profitable use of our time. It is the case that in Lyondell
22 a trust just like this one was part of a confirmed plan, so
23 it's not like we're going anything new or extraordinary.
24 But if putting in that kind of clause would save the day on
25 this and give us some time to turn to some other things, I'd

1 be happy to do it. I don't feel, Your Honor, the need to
2 reargue at any length these issues about what the case means
3 when it says that the -- when the estate has possession or
4 control of a claim, that it gets first swing or first crack
5 and then what happens after it yields that first crack.
6 We've been down that road. We all know what the Barone [ph]
7 case says. So perhaps I'll let that go. I guess I'll only
8 note that at least nobody is using the word Enron this time
9 and that makes me happy. Thank you, Your Honor.

10 THE COURT: Thank you. Shall we move on?

11 MR. LANTRY: Sir, Your Honor, Kevin Lantry. That
12 brings us to the objections to the DCL plan and its bar
13 order.

14 MR. MCCAMBRIDGE: Good afternoon, Your Honor. My
15 name is John McCambridge. I'm here on behalf of certain
16 DNO's and we're objecting to the DCL plan because its
17 proposed bar order violates 1129(a). As Your Honor knows,
18 the proponents have the burden of demonstrating compliance
19 and they cannot. My clients are either current or soon to
20 be defendants in multiple actions arising out of the LBO or
21 facing actions by a litigation trust, a creditors trust, and
22 individual creditors.

23 Now I want to start with the natural state of
24 affairs, which is that my clients have claims of
25 contribution and non-contractual indemnity that they may

1 choose to bring against other individuals and entities. Now
2 there's well-settled, non-bankruptcy procedures for dealing
3 with those claims. We got various state laws, uniform acts,
4 contribution acts, and those are all out there and that's
5 what we have today. Now the DCL plan proposes to upset the
6 natural currently existing state of affairs, the one that
7 exists between my clients, who are non-debtors, and these
8 other individuals and entities, who are also non-debtors.
9 Now the DCL plan proposes to do this with a bar order that
10 they've negotiated with each other and without any consent
11 or participation by us. Now the background is that the
12 debtors entered various settlement agreements with non-
13 debtors. The appropriateness of those settlement agreements
14 we understand has been a significant topic in this Court for
15 at least the last month. But what we're focused on is one,
16 apparent feature or product of those settlement agreements
17 and that's the bar order that's included at paragraph 11.3
18 of the DCL plan. And the bar order that they've proposed
19 would prevent my clients from bringing claims for
20 contribution or non-contractual indemnity against anybody
21 that's covered by their settlement agreements. And that
22 seems to us as far as we can tell to be a vast array of
23 individuals and firms, not readily identifiable at all.

24 Now turning to what that means. The DCL bar
25 order is a non-consensual release of our claims, non-

1 debtors, against other non-debtors. So there's no question
2 that the bar order, if entered, would release our claims.
3 There's no question that they're non -- it would be a non-
4 consensual release. There's no question that we're non-
5 debtors and no question that the people being released by
6 their plan are also non-debtors as well. So 524(e) and
7 especially in the Third Circuit, it's very clear that they
8 require strict special scrutiny of any such purported
9 release. There's four factors that are relevant. Those are
10 laid out in Continental and in Spansion. As applied to this
11 case the four are first, is this non-consensual release
12 necessary to the success of the reorganization? In this
13 instance the non-consensual release, the one being imposed
14 on us, is attached to some unknown number of settlement
15 agreements. So the relevant question on that would be is
16 each of those settlement agreements necessary to the
17 reorganization and if so, is the non-consensual release
18 being imposed on us necessary to those settlement
19 agreements. That's factor one. Factor two, are the
20 entities that are being released from our claims, are they
21 providing -- making a critical financial contribution to the
22 DCL plan? Factor three, is each of the entities that's
23 being released on our claims making a financial contribution
24 that's necessary to make the plan feasible? Again, these
25 are embedded in the settlement agreements that exist that

1 they did with the debtor. Finally, we come to factor four.
2 If factors 1 to 3 are met, there's a final factor that
3 focuses on the people in the position of my clients and that
4 is is the release, the imposed release of our claims fair,
5 is it fair to us, the non-consenting people or entities and
6 the issue is are we being fairly compensated for the forced
7 release of our claims? That's factor four. That's the one
8 we're going to focus on mostly. Let me just briefly comment
9 on factors one to three. Now the issues there in one to
10 three all regard the financial elements of the various
11 settlement agreements and presumably those have been
12 addressed at length during the hearings that have just
13 concluded. And we're not here in a position ourselves to
14 evaluate the showing that was made on those issues over the
15 last three weeks or month or whatever period of time these
16 hearings have gone on. As we note in our written objection,
17 however, that's been a topic, it is a topic of contention
18 between the parties in the confirmation hearing and we
19 understand that the Court will be looking at these issues on
20 its own in any event. And all we would note is it's up to
21 the proponents of this bar order to demonstrate that they
22 satisfy factors one to three.

23 Now assuming for purposes of the analysis that
24 factors one to three are satisfied, that's when factor four
25 becomes relevant. Here's the proper analysis on factor

1 four. We have to ask what consideration is being provided
2 to us in exchange for being forced, if the order were
3 entered, to release our claims. Is the consideration
4 offered fair? Now in this instance according to the DCL
5 proponents, the consideration given is the purported
6 replacement of our contribution claims and indemnity claims
7 with something that is supposed to be equivalent. And what
8 that is under the proposal is the use in future courts, in
9 the litigation courts, of a proportionate fault procedure,
10 specifically that future courts will apply a proportionate
11 fault proceeding, conduct a proportionate fault proceeding,
12 so that our clients will be held responsible for only their
13 portion of any liability. And that's it. That's what's
14 supposedly being offered to us. And the DCL proponents say
15 well, that's fair consideration. You're getting the
16 equivalent of a contribution claim, the bar order says well,
17 any court in which you're sued by the litigation trustee,
18 the creditor trustee, individual creditors, they're already
19 talking about bringing cases all over the country, as Your
20 Honor knows. Any of those future litigation courts will
21 have to apply the proportionate fault hearing, conduct a
22 trial, alongside the liability trial for our clients and
23 make sure that we are, if found liable on anything, required
24 to pay only our proportionate fault. Now what's the problem
25 with this? As I said, first and foremost according to the

1 DCL plan and recent events, we're allegedly going to face
2 multiple suits in multiple jurisdictions, state and federal,
3 around the country. As I said Plaintiffs including
4 litigation trustee, creditor trustee, and now individual
5 creditors. Without the bar order we have our claims of
6 contribution and indemnity and the attendant statutory case
7 law, protections that have developed over the years. With
8 the bar order we don't. Now is it sufficient for the bar
9 order to say future litigation courts will do this? That's
10 essentially what it says. And what we are concerned about
11 and what we have raised on February 15 and ever since is
12 what happens if one of these other courts does not apply the
13 proportionate fault provisions, does not conduct a
14 concurrent hearing to be sure that we're entitled and get
15 the benefit, such as it is, of the bar order, of the
16 proportionate fault reduction. Again, remember this is
17 their plan forced on us. Our position is that if a court
18 were not to apply the proportionate fault procedures in
19 full, that the burden of that failure has to fall on the DCL
20 proponents and whatever plaintiff has brought that claim.
21 It cannot be imposed on us.

22 What does the DCL's proposal do? It does impose
23 it on us. Their written response on this issue says you
24 know there's a low probability that a court elsewhere would
25 not fully apply the proportionate fault proceedings, but if

1 that happens, tough luck for you, that it's our problem, we
2 can come back to this court, but the people who are suing us
3 are not under and enjoined by the bar order. And under
4 their procedures we can well be in Court in any number of
5 jurisdictions, Oklahoma, Cook County where I'm from, with a
6 judge that doesn't think that he's going to apply it. He
7 doesn't conduct imaginary trials. He doesn't like the empty
8 chair. We've all been there. Anybody that's been -- that's
9 tried cases around in different jurisdictions knows that
10 different judges run their courtroom their way. So for us
11 to be exposed to the possibilities and it's crystal clear we
12 are, that the proportionate fault procedures are not
13 followed by future courts, means that were are not getting
14 consideration for the forced release of our claims. And
15 that's utterly unacceptable to us. It's not fair and it's
16 wrong on multiple levels. The only consideration or
17 compensation that we're allegedly getting for these non-
18 consensual releases is a proportionate fault hearing and
19 determination. If we don't get that, the consideration has
20 failed. No consideration, no compensation, that's unfair,
21 it's inequitable and it's a violation of 524(e).

22 In addition, the way that they've got this
23 constructed, if you look at the plaintiff's incentives,
24 according to this the plaintiff does better if the
25 proportionate fault rule is not applied. Why is that?

1 Without the proportionate fault rule and without us being
2 able to bring contribution claims, the possibility is clear
3 that we could be hit for the full amount of damage, without
4 use of proportionate fault, and without contribution. What
5 does that mean? Their recovery goes way up and beyond
6 what's envisioned allegedly by this rule or by this order.
7 And that's their incentive. Essentially they've got
8 opportunities for double recovery. Can I imagine a
9 plaintiff somehow looking for a jurisdiction that might not
10 follow an order from this court? It's possible. Now it's
11 also just not acceptable under the law. This is their plan.
12 If the litigation court does not deliver in proportionate
13 fault, the burden of failure has to rest, would have to rest
14 on the proponents and whatever plaintiff is trying to take
15 advantage of the bar order -- of this procedure. So the
16 burden of failure has to be on them. This is their plan,
17 non-consensual, imposed on us. That's not what this order
18 says at all and it's very telling what it doesn't say. It
19 does not put the burden on them of a court not going forward
20 and applying this. The only way perhaps that you could deal
21 with this would be by including in the bar order itself, an
22 injunction, a set of injunctions directed against the
23 plaintiffs, the people that the DCL proponents are pushing
24 forward here and that are going to be the people suing us,
25 right? So some of the things that you might have in such an

1 order would be that any plaintiff suing us would be barred
2 from seeking any amount greater than the proportionate
3 liability, if any, of the non-settling defendants, us.
4 That's what was done in the Eichenholtz [ph] case in the
5 Third Circuit. In addition, other things that you would
6 have to have would be if a litigation court were not
7 following through on applying the full protections of
8 proportionate fault. The plaintiff in the order entered by
9 this court, the plaintiff should be subject to injunction,
10 being enjoined immediately, that they cannot proceed in that
11 other court. Stop. Full stop. In addition, issues about
12 prohibiting a plaintiff once again in any order entered by
13 this Court, asserting jurisdiction over that Plaintiff in
14 this order saying you can't take any steps to have any
15 judgment that's entered -- any judgment against us entered,
16 enforced, collected, etc. If the proportionate fault rules
17 are not applied, you're enjoined. And these are -- granted
18 these are potentially complicated issues to get the
19 injunction right. It's not even attempted here, not even
20 attempted.

21 Additionally there would be jurisdictional issues
22 that are also not addressed here. For example, this court
23 certainly has jurisdiction over the litigation trustee and
24 it would be easy to add that entity or person in. And the
25 DCL plan itself does provide for continuing jurisdiction by

1 this Court, I understand over the litigation trustee. The
2 creditors trustee, though, a creature of this court created
3 by this court, also somebody that could be subject to an
4 injunction in this order to make sure that things are done
5 properly. I understand the DCL position to be there's no
6 jurisdiction of this court over the creditors trustee in the
7 future.

8 As for individual creditors, you've already dealt
9 with the fact that these lawsuits are apparently coming and
10 any individual creditor who is operating as a plaintiff, the
11 same thing would have to apply. There would have to be a
12 method by this court in this order to enjoin any other
13 plaintiff, anybody that's suing us from avoiding the
14 proportionate fault rules and then stopping the litigation
15 if it's not applied.

16 So in our view the DCL plan does not measure up
17 at all for this critical issue in terms of factor four,
18 under Continental and Spansion. The way it's structured we
19 are not being given appropriate fair and actual
20 consideration in exchange for the loss of these claims. And
21 for that reason it fails 524(e).

22 Now there are other problems with the DCL bar
23 order, so that even if the burden of failure issue and the
24 injunction issue were resolved as to all of the potential
25 plaintiffs, there would be other issues. One, you've got to

1 be practical I think with regard to the drafting of one of
2 these bar orders. The notion is that you'd be bringing this
3 to another court that's not a bankruptcy court, maybe a
4 state court, with little experience in a lot of these
5 issues. If you read the bar order that's proposed, it ought
6 to be self-contained and intelligible to other courts. This
7 one is not. You read it and it would require all kinds of
8 reference back into the plan and it really -- I bring this
9 up in part because the unintelligibility of the bar order as
10 proposed really only heightens, increases the chances that a
11 state court judge would either ignore it or get it wrong.
12 So that's an additional problem that's intertwined with the
13 first part of the argument. In addition, the -- to be
14 equivalent to a contribution claim and I'm not saying it's
15 identical, but in terms of even rough equivalency the
16 proportionate fault issue would have to be determined by the
17 same trier of fact that's determining our liability, if any.
18 So it would have to run together if it's going to be like
19 that. That's not provided for. And again if you go to the
20 Eichenholtz case, it's not a bankruptcy case, but it
21 addresses these issues directly and exactly. The plaintiff
22 can't seek anything more than a proportionate fault judgment
23 and the trial has to proceed together so that if you're
24 going to take it away you've got to provide the equivalent,
25 roughly equivalent benefits. This plan doesn't do it.

1 I referenced the perversity of the plaintiffs
2 bringing these claims that have been constructed or assigned
3 into various buckets by the DCL people. And again I
4 emphasize the plaintiffs then do better if the proportionate
5 fault plan is not used by the litigation court. They do
6 better. That's a perverse incentive. In addition, the
7 entities that are protected from our contribution claims,
8 not only will they be protected, but they'd be sharing --
9 they'd be protected against claims from us and they'd be
10 sharing in any recoveries by the litigation trustee or the
11 creditors trustee any recoveries that are made against our
12 group. So as a couple of courts have pointed out in
13 arguments, et cetera, those people then they're protected
14 and they have now an incentive to trash the transaction in
15 which they have -- in which they may have played an integral
16 part.

17 So for all those reasons this bar order does not
18 work and it renders under 524(e), it can't be approved and
19 as I said none of the things that we would have needed are
20 there. There's not an injunction against the plaintiffs.
21 There's not retained jurisdiction over all the plaintiffs
22 and any other entities suing us. So for all those reasons,
23 Your Honor, we object to the plan because the bar order does
24 not work and cannot be used. Thank you.

25 THE COURT: Thank you.

1 MS. STEEGE: Good afternoon again, Catherine
2 Steege. We simply join in the argument that was made by the
3 directors and officers.

4 THE COURT: Thank you.

5 MR. PACHULSKI: Excuse me, Your Honor.

6 THE COURT: Yes.

7 MR. PACHULSKI: Hi. This is Isaac Pachulski of
8 Stutman, Treister, and Glatt for Brigade Capital Management
9 and I'm -- I've been following with the agenda and I think
10 Brigade is next, but I'm not sure. I apologize. I don't
11 intend to preempt anybody else, but if I am next I just
12 wanted you to know I'm here sort of.

13 (Laughter)

14 THE COURT: Thank you, Mr. Pachulski. Hold on
15 just one moment.

16 MR. HANNAFAN: Good day, Your Honor. Blake
17 Hannafan of Hannafan & Hannafan on behalf of Timothy Knight.
18 We had joined in the objection of the certain officers and
19 directors and we again, Your Honor, just join and adopt the
20 arguments of Mr. McCambridge.

21 THE COURT: Thank you.

22 MR. HANNAFAN: Thank you.

23 THE COURT: All right. I think we now are ready
24 for Brigade.

25 MR. RILEY: No, Your Honor.

1 THE COURT: Oh, I'm sorry.

2 MR. PACHULSKI: Thank you, Your Honor. Again for
3 the record Isaac Pachulski --

4 THE COURT: No, Mr. Pachulski --

5 MR. PACHULSKI: -- of Stutman, Treister, and
6 Glatt professional corporation.

7 THE COURT: I'm sorry. There is one more.
8 Please pause for another moment. Forgive me.

9 MR. PACHULSKI: Happy to.

10 MR. RILEY: Your Honor, Richard Riley from Duane
11 Morris on behalf of the foundations. Your Honor, with me
12 today is David Bohan from the Katten Muchin firm. And I
13 don't know if we have filed pro-hoc papers, but I'd ask that
14 he'd be heard today and I'll follow up with pro-hoc papers.

15 THE COURT: Very well. Thank you.

16 MR. BOHAN: Thank you for hearing me, Your Honor.
17 I'm here this afternoon on behalf of the Robert McCormick
18 Foundation and the Cantigny Foundation. Your Honor, we have
19 joined in the objections to the DCL plan that have been
20 filed by certain officers and directors and I also adopt the
21 comments that were made this afternoon by Mr. McCambridge.
22 We agree that the bar order is over broad and that in
23 exchange for -- that the conferring on the non-settling
24 defendants of a speculative, hypothetical, and potentially
25 unenforceable judgment reduction provision sometime in the

1 future is not fair and adequate compensation for the
2 certainty and the immediacy of the forced taking of our
3 contribution and indemnity rights by virtue of the
4 confirmation of this plan.

5 Your Honor, I won't repeat everything that's been
6 said, but I do note that the contribution bar order has been
7 defended on the grounds that it's necessary to bring about a
8 final peace, the certainty that the settling defendants will
9 know what their maximum liability has been. In the DCL plan
10 memorandum, for example, the plan proponents state that
11 settling defendants are entitled to the benefit of their
12 bargain, namely that they cannot be held liable on account
13 of the settled claims beyond the consideration that was
14 already paid pursuant to the settlement. That's all well
15 and good, Your Honor, but the bar order in this case goes
16 far, far beyond that and is completely unnecessary. It is a
17 difficult document to parse, but if I understand it
18 correctly, Your Honor, it would preclude -- it would not
19 preclude, for example, released parties from initiating
20 contribution claims of their own against other than released
21 parties. In other words, the beneficiaries of the bar order
22 themselves I believe have preserved their own rights to
23 bring contribution claims against parties like my clients,
24 the foundations. And that's completely unnecessary. Unless
25 the Court has any questions --

1 THE COURT: I do not.

2 MR. BOHAN: All right. Thank you, Your Honor.

3 MR. PACHULSKI: May I proceed, Your Honor?

4 THE COURT: Not yet.

5 (Laughter)

6 MR. PACHULSKI: Thank you.

7 MR. LOIZIDES: Your Honor, Chris Loizides. I'm
8 just here as local counsel with Mr. Pachulski, who's on the
9 telephone.

10 THE COURT: Oh, okay.

11 MR. LOIZIDES: Thank you.

12 THE COURT: All right. Mr. Pachulski, you may
13 proceed.

14 MR. PACHULSKI: Thank you, Your Honor. For the
15 record, Isaac Pachulski of Stutman, Treister & Glatt
16 appearing for Brigade Capital Management.

17 Our objection to the bar order is very limited
18 and it's very different from what Your Honor's heard thus
19 far. Our objection is to that portion of the judgment
20 reduction provision which is the second paragraph of the
21 proposed order that would purport to apply judgment
22 reduction to claims that the estate does not own and has
23 admitted that it does not own and that the estate cannot
24 release and that the estate has admitted it can't release,
25 namely the individual creditors state law fraudulent

1 conveyance, constructive fraudulent conveyance claims that
2 Your Honor has heard so much about. And the fact is there
3 is simply no precedent, no reported decision that permits
4 the imposition of involuntary judgment reduction on anyone
5 other than a settling plaintiff.

6 Now I'd like to put this argument in context with
7 a couple of preliminary observations, Your Honor. First,
8 from the time that we filed our objection where we spent a
9 great deal of time talking about these individual creditor
10 claims, we've had two concerns. One is that the distinction
11 between the estate claims and the individual creditor claims
12 be recognized and that they not be conflated. And second,
13 that the plan not advertently or inadvertently release the
14 individual plans that the estate doesn't own. And between
15 the time of the objection and today there have been prior
16 iterations of the plan. And we've actually corresponded
17 with the debtors on this. And with the exception of this
18 issue, they management to resolve our other concerns on this
19 point of avoiding the conflation and avoiding the relief,
20 but this issue remains outstanding.

21 The second point that I think is critical to
22 understand and is contrary to what you've heard thus far is
23 that if you didn't have the second paragraph, you didn't
24 have the judgment reduction, there is already a judgment
25 reduction resulting from this settlement.

1 Now this settlement if it's approved by the Court
2 and if the Court finds that it's fair and equitable, will
3 result in a dollar for dollar judgment reduction because at
4 least in the context of a fraudulent conveyance claim and I
5 can't speak to other types of tort claims, if for example,
6 somebody with a \$100 claim gets a \$30 distribution as a
7 result of a settlement, there's already a judgment reduction
8 because inter fraudulent conveyance claim, you can't seek
9 more than your claim.

10 So to the extent that there are distributions
11 resulting from this settlement, that will automatically
12 reduce without anything and this will true in any Court
13 whoever decides fraudulent conveyance, there will be a
14 dollar for dollar reduction for what the case law refers to
15 as the pro tanto reduction.

16 The issue here is here is different because the
17 proposal goes beyond that and would impose what's called a
18 proportionate reduction. So that would mean that if a Court
19 decides that the settling banks were liable to the selling
20 stockholders, then it would take the judgment that the
21 senior noteholders would have gotten, multiply that by the
22 bank's proportionate liability, and reduce the judgment by
23 that amount.

24 As applied in this case to parties who are not
25 settling plaintiffs, this has two perverse and in at least

1 one case, bizarre results. The first is that the reduction
2 in our judgment, the senior noteholders judgment, could far
3 exceed anything we get under the settlement. For example,
4 and this is just a hypothetical, it's not in the evidence,
5 if there's a \$1.5 billion judgment against selling stock --
6 against to Step 2 selling stockholders and a Court
7 subsequently finds that actually the banks were also at
8 fault, the banks were really liable and that their share is
9 50 percent, our judgment goes down \$750 million. And no
10 matter how you slice the numbers, we're not getting \$750
11 million out of the settlement. But beyond that, it places
12 us in an impossible position. We're going to have to -- to
13 protect our judgment against selling stockholders, we're
14 going to have to argue that the banks weren't liable.

15 Now I'd ask the Court to consider how bizarre
16 that is in light of what you've heard for months in this
17 case, including over twelve days of trial. After having
18 argued vociferously that the banks were liable because we
19 think the banks are liable, we're now going to have to say
20 no, we were only kidding, they're really not liable and it's
21 all your fault.

22 But whether or not those are fair or appropriate
23 results, they're illegal results because the application of
24 judgment reduction to someone who's not a settling plaintiff
25 and not a debtor as distinguished from the estate claims

1 which are not the subject of this argument which raise
2 different issues is an illegal third party release. And
3 although the debtors, the plan proponents cite various bar
4 order and judgment reduction cases at Pages 111 through 117
5 of their brief, there is not a single case, they cite not a
6 single reported case where judgment reduction has been
7 involuntarily imposed on anyone other than a plaintiff.
8 What happens is if a plaintiff wants the settlement and the
9 plaintiff wants to bar order, the plaintiff who wants the
10 settlement has to subject himself to judgment reduction.

11 Now the debtors and the plan proponents have
12 asked this Court to consider the confirmation order in
13 *Lyondell* where judgment reduction was apparently applied to
14 a creditor trust. And here I'd actually like to echo
15 something that one of the counsel for the plan proponents
16 pointed out early on in arguing about the indemnities with
17 respect to Zell. Counsel pointed that a confirmation order
18 which is not the result of any reported opinion and which
19 had -- does not explain the reasoning for the decision,
20 should be discounted. In fact, I agree, except it shouldn't
21 be considered at all. It's a confirmation order. We don't
22 know if anybody objected. While there is a vague reference
23 in this confirmation order to any objections being
24 overruled, that's boilerplate language. We don't know who
25 objected or why. So the fact that in some other Court where

1 the issue was not litigated might have decided this was
2 appropriate is meaningless.

3 I would also add that if you were going to assess
4 the *Lyondell* decision, while they did have a creditors'
5 trust, from what little I've seen, it appears that they kind
6 of conflated the estate claims and creditor claims and they
7 treated this as an abandonment and a reversion which with
8 all due respect is analytically incorrect. These aren't
9 estate claims and shouldn't have been treated as such.

10 So that there really is no authority for what
11 they proposed to do. And I'd like the Court to consider the
12 following hypothetical so the Court will understand they
13 couldn't even do this outside the Bankruptcy Court. Suppose
14 you have two plaintiffs and they were both injured in the
15 same car accident and they're each suing two defendants.
16 And one of the plaintiffs decides they want to settle with
17 one of the defendants. So the settling plaintiff settles
18 with on defendant and wants to get a bar order. No case
19 that holds that the, excuse me, that the non-settling
20 plaintiff can be forced to undergo a judgment reduction so
21 that the settling plaintiff can get the bar order. But
22 that's exactly what they're trying to do here.

23 Beyond that, Your Honor, if you were to decide
24 that on some basis that you can impose a judgment reduction
25 on the individual creditors, they should be limited to a

1 dollar for dollar pro tanto reduction. To begin with, there
2 is precedent for such a limited reduction in one of the
3 cases that the DCL plan proponents cite. It's the *Munford*
4 case out of the Eleventh Circuit. And in that case, over
5 the objection of non-settling defendants, the Court affirmed
6 a judgment reduction that was limited to dollar for dollar.

7 But beyond that, there are two important reasons
8 that that limitation is appropriate here. First, you're not
9 dealing with a settling plaintiff. Second, to approve the
10 settlement at all, the Court is going to have to decide that
11 it's fair and equitable and that the banks are paying a
12 reasonable amount. And third, and this is a point that's
13 indicated in the *Eichenholtz* case out of the Third Circuit
14 which was actually cited by someone else in a different
15 context. The Court there explained that when you apply
16 apportionate judgment reduction to a plaintiff, the risk of
17 a bad settlement falls with the plaintiff. In other words,
18 if the plaintiff settles a \$100 case against one defendant
19 for \$30 and the proportionate liability of that defendant
20 was really \$50, the burden of that settlement falls on the
21 plaintiff who settled and that makes sense where a plaintiff
22 decides to settle. But by definition, we haven't decided to
23 settle and so that construct is wholly inappropriate.

24 And again, this is a fallback, Your Honor. With
25 respect, I don't think there's any basis to impose judgment

1 reduction on plaintiff, but if you do, it should be limited
2 to what is already going to happen anyway by operation of
3 law which is the judgment reduction should be limited to the
4 amount of the settlement proceeds that are applied to the
5 payment of the debt that's the subject of any fraudulent
6 conveyance action. And with that, I'd conclude my remarks
7 on this point.

8 THE COURT: Thank you.

9 MR. GOLDEN: Good afternoon, Your Honor. Daniel
10 Golden, Akin, Gump, Strauss, Hauer & Feld, counsel for the
11 Aurelius and the noteholder plan proponents.

12 Your Honor, I don't rise to lodge an objection in
13 general to the bar order. We do, in fact, object globally
14 to the bar order as set forth in our confirmation objection.
15 But understanding the rules of the game, because much of the
16 global nature of the bar order will be dependent upon Your
17 Honor's ultimate determination as to the reasonableness of
18 the settlement, we have determined that we're not going to
19 press the global nature of our objection to the bar order
20 until closing arguments because it will involve getting into
21 the evidence.

22 With respect to the specific point and just so
23 that Your Honor knows, I have informed the other side that
24 we were going to wait to the closing arguments to object to
25 the global nature of the bar order, but did indicate that we

1 were going to object and it will be our turn tomorrow. But
2 we rise to -- our objection will be limited to the
3 application of the bar order as it relates to disclaim state
4 law fraudulent conveyance claims, the issue that Mr.
5 Pachulski just discussed with the Court. So really this is
6 just an indication that our turn on that issue will come
7 tomorrow. I thought Mr. Pachulski handled it exceedingly
8 well. We may have very little to add to that point, but I
9 didn't want to -- I wanted the Court to know what the
10 noteholder plan proponents' position was with respect to
11 these issues.

12 THE COURT: It's the noteholders' placeholder.
13 (Laughter)

14 THE COURT: Thank you, Mr. Golden.

15 MR. MOSKOWITZ: Your Honor, good afternoon.
16 Elliot Moskowitz representing JP Morgan Chase.

17 I actually just have a minor objection to Mr.
18 Golden's placeholder. I think that if the arguments that
19 he's going to raise tomorrow are going to be I think as he
20 conceded essentially duplicative of Mr. Pachulski's
21 arguments or certainly deeply related to Mr. Pachulski's
22 arguments with respect to the disclaim state law avoidance
23 claims, why doesn't he do that -- why doesn't he put those
24 arguments out right now and this way we can in an organized
25 way respond to all of the legal arguments with respect to

1 the bar order in one shot. I think it makes for not the
2 greatest presentation for these arguments to have been made
3 by others and by Mr. Pachulski and then us to respond and
4 then tomorrow Mr. Golden makes the same, essentially the
5 same argument, perhaps exactly the same argument that Mr.
6 Pachulski made and then we have to respond again or respond
7 differently. I just don't think that makes good sense.

8 THE COURT: Okay. Before my head explodes, I'll
9 just say no.

10 (Laughter)

11 MR. MOSKOWITZ: Very well, Your Honor.

12 THE COURT: Thank you.

13 (Laughter)

14 MR. MOSKOWITZ: So, Your Honor, I do rise to
15 respond to the arguments that have been made today in
16 connection with the bar order or the contribution bar that's
17 contained in the DCL plan. I think the most helpful way for
18 me to organize my remarks at the Court's discretion is to
19 first address the arguments that have been made by I guess
20 the directors and officers which I think go to the bar order
21 generally and to bar orders generally. Then to spend a
22 little bit of time going through the more specific comments
23 they had about the bar order that don't challenge bar orders
24 generally, but challenge some of the specific provisions of
25 this particular bar order. And then to conclude by

1 addressing some of the comments that Mr. Pachulski made with
2 respect to the disclaim state law causes of action in
3 particular which I understood to be the core of his argument
4 and objection with respect to the bar order.

5 The director and officer defendants and all of
6 those joining their arguments, but apparently not Brigade,
7 appear to argue that a bar order is essentially in all cases
8 inappropriate. And we think that is simply wrong. Case
9 after case, including the Third Circuit itself in the
10 *Eichenholtz* decision, but also in the bankruptcy context
11 including a decision by Judge Shannon just a few months ago
12 in *in re: Semcrude*, a decision that you've heard nobody talk
13 about so far and that is featured in none of the papers
14 except for our papers. Those cases have fully endorsed the
15 concept of a contribution bar just like the one that we have
16 over here. And as I'll describe more fully in a couple of
17 minutes, I want to be very clear about something because
18 there's been I think a lot of confusion today about this.

19 A bar order is not a third party release, it is
20 something different than that. It is a tool the Courts have
21 endorsed to encourage a settlement in multiparty cases to
22 ensure that a settling defendant doesn't have to pay twice
23 for the same liability, first by paying consideration in the
24 settlement and then again for contribution joint liability
25 in respect of that same liability.

1 Let me begin with the case law itself because I
2 think it's important to study the leading cases, especially
3 the two most leading ones from this jurisdiction. The
4 leading case on this topic in this circuit and hopefully
5 there's no debate about this is the *Eichenholtz case*, 52
6 *F.3rd 478, Third Circuit 1995*.

7 In *Eichenholtz*, the plaintiff reached a
8 settlement of a securities class action lawsuit with some,
9 but not all of the defendants. The settlement agreement
10 included a bar order which barred the non-settling
11 defendants from asserting a contribution claim against the
12 settling defendants just like the contribution bar does
13 here. This provision was challenged by the plaintiff.

14 The District Court approved the bar order and
15 then the Third Circuit approved the bar order as well. The
16 Court reasoned that bar orders are necessary tools to
17 facilitate partial settlements in cases with multiple
18 defendants and they should be endorsed. And that's worth
19 quoting from the Third Circuit's own words and I'll just do
20 that briefly. And I'm quoting from the *Eichenholtz* decision
21 at Page 486. "In general, the settlement of complex
22 litigation before trial is favored by the Federal Courts.
23 However, in multiparty litigation, settlement may be
24 difficult. Defendants who are willing to settle by little
25 peace through settlement unless they are assured that they

1 will be protected against co-defendants efforts to shift
2 their losses through cross claims for indemnity,
3 contribution, and other causes related to the underlying
4 litigation. Therefore, in cases involving multiple
5 defendants, a right to contribution inhibits partial
6 settlement. Therefore, in order to encourage settlement in
7 these cases, modern settlements increasingly incorporate
8 settlement bar orders into partial settlements."

9 And the Third Circuit went on to say that the bar
10 order must include a judgment reduction component so that
11 the non-settling defendant is not prejudice by being barred
12 from bringing the contribution claim that that defendant
13 would ordinarily have.

14 In other words, instead of bringing the
15 contribution claim, the non-settling defendant gets the same
16 benefit by getting its judgment reduced by the amount that
17 it would have received had it asserted a contribution claim.
18 And the Third Circuit in *Eichenholtz* again, expressly agreed
19 that "Proportionate judgment reduction is the fairest method
20 and the non-settling defendants will not be prejudiced by a
21 proportionate fault reduction." And that's at Pages 486 and
22 487.

23 And just to go slightly out of order, Mr.
24 Pachulski criticized the proportionate fault reduction
25 formula that is set forth in the bar order in our case. I

1 don't particularly have a dog in that fight other than to
2 say that we are in the Third Circuit and we have clear Third
3 Circuit case law saying that among the different ways you
4 can calculate the reduction, the proportionate fault is the
5 best way -- is the most fair way to do it quoting from the
6 Third Circuit directly.

7 And so, Your Honor, that is, in fact, what we
8 have in this case, a partial settlement of a litigation with
9 multiple defendants with some defendants are settling, some
10 defendants are not settling, and a bar order that prevents
11 those non-settling defendants from suing for contribution,
12 but at the same time granting them judgment reduction
13 through a proportionate fault formula as was the case in
14 *Eichenholtz*. But let me not stop with *Eichenholtz*. This is
15 true also in the bankruptcy context. And I think that the
16 most important precedent or an extremely precedent is Judge
17 Shannon's recent, very recent decision in *in re: Semcrude*,
18 *210 Banker Lexus 4160, Bankruptcy Court, District of*
19 *Delaware, November 19, 2010* which nobody has discussed.

20 In *Semcrude*, a settlement was reached by the
21 parties and was conditioned in part on the entry of a
22 contribution bar discharging individual defendants "from all
23 liability to any other person for contribution or indemnity
24 relating to the released claims." The settlement also
25 contained a provision preserving judgment reduction rights

1 of the non-settling defendants as well.

2 A non-settling party objected to the settlement
3 on the grounds that the contribution bar didn't comport with
4 that individual's due process rights. Similar in some
5 respects to the objections that are being lodged by the
6 director and officer defendants here. Judge Shannon soundly
7 rejected this objection and approved the bar order at issue.
8 He held among other things, that the bar order was not
9 prejudicial to the non-settling party because that party was
10 still permitted to take the judgment credit corresponding to
11 what that party would have gotten though the contribution
12 claim. And in the process, Judge Shannon cited approvingly
13 to the *Eichenholtz* decision and stated that "Courts in
14 similar proceedings routinely approve contribution bars."
15 And again, as I said, quoted approvingly from *Eichenholtz*.

16 I'm not going to go through a whole laundry list
17 of cases. The other cases are set forth in our brief. I
18 will make passing reference to the Third Circuit's decision
19 in *Nutraquest* as well which is supportive of a bar order and
20 that, too, was also in the Third Circuit sitting in appeal
21 on the Bankruptcy Court's ruling below 434 F.3rd 639.

22 And let me conclude this portion of my argument
23 by saying that it's not just a matter of judicial invention,
24 there are many states that have similar provisions, both
25 Illinois and Delaware also have judgment reduction

1 provisions, contribution bars that come with judgment
2 reduction provisions as well, although in the *Eichenholtz*
3 decision -- I guess in response to some of the comments that
4 were made as to why don't you just -- why don't we just
5 forget about this whole thing and just rely on whatever
6 rights people may have under state law, *Eichenholtz* counsels
7 against that and says that it is desirable to fashion a
8 federal doctrine with respect to contribution bars and not
9 simply to revert to whatever state law people have because
10 that would encourage possibly foreign shopping.

11 So I think that these cases are important. I
12 think they sort of set out the lay of the land with respect
13 to the use of contribution bars in complex cases involving
14 partial settlement.

15 Now to respond to the points that have been made
16 repeatedly about the contribution bar constituting a third
17 party release and we've heard quotations from *Spanion* of
18 course and we've heard quotations from *Continental*. I want
19 to be very clear about this. The parties have gotten -- the
20 parties that are least calling the entirety of the bar order
21 as third party release, have gotten it wrong. And the fact
22 that they've tried to analyze the bar order under the
23 factors that you typically would use to analyze a non-
24 consensual third party release are not appropriate for
25 purposes of this analysis.

1 (Telephone recording interruption)

2 (Laughter)

3 MR. PACHULSKI: Hello?

4 MR. MOSKOWITZ: There's plenty of activity.

5 (Laughter)

6 THE COURT: Is the Court Call Operator on the
7 line?

8 COURT CALL OPERATOR: Yes, Your Honor, I'm here.

9 THE COURT: All right. Have we fixed the problem
10 with that one line?

11 COURT CALL OPERATOR: I did. I fixed the
12 problem.

13 THE COURT: Thank you.

14 COURT CALL OPERATOR: You're welcome.

15 THE COURT: You may proceed.

16 MR. MOSKOWITZ: Thank you, Your Honor. To be
17 very clear about this, the bar order only prevents non-
18 settling defendants, non-released parties from bringing
19 contribution and indemnity claims against released parties
20 for barred claims. And we've amended the bar order in
21 response to the objections that have been filed to make it
22 crystal clear that it has nothing to do with third party
23 claims. And I'm quoting now, quote -- this is a quote from
24 the bar order, "Order that nothing herein shall prejudice or
25 operate to preclude the rights of any barred person to

1 assert any claims or causes of action, including without
2 limitation any direct or personal claims or causes of
3 actions other than claims for non-contractual indemnity or
4 contribution against any released party as set forth above."

5 We've tried to make it crystal clear that all we
6 are talking about here is liability for contribution claims
7 so that we don't pay twice; one in the settlement and then
8 once again in respect of that same liability if a Court
9 finds that we're jointly liable with a non-settling
10 defendant.

11 Let me move now to the what I will call the
12 procedural fairness arguments that have been made,
13 principally by the director and officer defendants. I think
14 their main concern that they articulated to you, Your Honor
15 is that the bar -- there's a concern, I guess that down the
16 line there will be another Court out there that will
17 disregard the injunctions of -- the rulings of this Court
18 and will simply fail to apply the bar order. Or I guess a
19 corollary concern, the parties in that case will fail to
20 adhere to this Court's instructions with respect to the bar
21 order. And the question is, you know, what happens then?

22 I think the first thing I'd like to say is that I
23 mean bar orders happen all the time and this concern
24 probably is relates to not just this bar order, but it would
25 relate to any bar order. And the truth is that there's I

1 think -- and frankly, even outside the bar order context,
2 there should be presumption that other Court in the United
3 States will follow the directives of a properly issued order
4 of another Court, full faith in credit, et cetera.

5 So I think that, you know, the concern about
6 another Court not following the order of this Court is
7 probably a remote proposition. But for the avoidance of all
8 doubt, the amended bar order clarifies that the Bankruptcy
9 Court retains continuing jurisdiction with respect to all
10 matters concerning the bar order, expressly including
11 matters related to the enforcement of the bar order.

12 And I think that it's not controversial
13 proposition to say that a Bankruptcy Court can retain
14 jurisdiction with respect to all manner of orders, but even
15 with respect specifically to a bar order, that has been done
16 time and time again. Judge Shannon did it in the *in re:*
17 *Semcrude* case. It was done in *Lyondell*. Judge Gerber
18 retained jurisdiction there as well in case there were any
19 issues down the line with respect to the bar order. It's
20 done -- it was done in the *MTC Technologies* shareholder
21 litigation in the Eastern District of New York in 2005.
22 Done in that bar order. It was done in the *Enron* case.
23 Courts routinely retain jurisdiction of -- over all manner
24 of orders, but also including specifically over a bar order.

25 I submit that that is a pretty substantial

1 protection that is available to the non-settling defendants
2 should something go wrong. And I would also say that what I
3 will just call the penalty provisions that the director and
4 officer defendants wanted to add to the bar order, while I
5 may not have a dog in that fight, that seems to be a
6 provision that you would -- provisions that were suggested
7 are not found in any bar order and I think it would be
8 offensive to whoever is pursuing those claims going forward.

9 THE COURT: You would agree though, would you
10 not, that a provision that -- well a retention of
11 jurisdiction provision in an order doesn't necessarily mean
12 that a Bankruptcy Court at any given point in time post
13 confirmation, in fact, would have jurisdiction, does it?

14 MR. MOSKOWITZ: I agree with that. Obviously,
15 the Court can only retain jurisdiction as to matters for
16 which it can retain jurisdiction.

17 THE COURT: Well, my point is, you know, at the
18 point of confirmation, the Court may have jurisdiction. Two
19 months after it may have jurisdiction. And a year later it
20 may not, depending upon the circumstances.

21 MR. MOSKOWITZ: Understood, Your Honor, but
22 specifically in response to that point, I would refer Your
23 Honor to the *Travelers Indemnity Company v. Pearlle Bailey*
24 case coming out of the Supreme Court in 2009, *129 S Court*
25 *2195, 2009*, in which the Supreme Court approved the

1 Bankruptcy Court's decision to enjoin State Court lawsuits
2 filed ten years after the approval of a plan of
3 reorganization in light of settlement orders that were
4 issued years prior.

5 And the Court, the Supreme Court there stated
6 "The Bankruptcy Court plainly had jurisdiction to interpret
7 and enforce its own prior orders. What is more when the
8 Bankruptcy Court issued its prior order, it explicitly
9 retained jurisdiction to enforce it." That doesn't sway
10 entirely Your Honor's concerns, but all I'm saying is that
11 it is standard for Bankruptcy Courts to retain jurisdiction
12 going on quite a ways into the future.

13 THE COURT: Oh, I know.

14 (Laughter)

15 MR. MOSKOWITZ: Okay. Moving on, Your Honor, to
16 some of the points that Mr. Pachulski made. I guess I sort
17 of -- there was a dissonance between Mr. Pachulski's initial
18 remark and frankly, my conversations with him privately and
19 what he presented to the Court. I mean, I think it is the
20 case that he has an issue with the bar order with respect to
21 one particular point of it and that's with respect to the
22 treatment of the disclaimed state law avoidance claims. He
23 mentioned a few other things in the course of his
24 presentation, but I think at its core, and he's filed no
25 pleading on this. Certainly though at its core in our

1 discussions and I think it's not, probably not disputed that
2 on the whole, other than the evidentiary objections that the
3 noteholders will present in closing, that Mr. Pachulski's
4 issue with the bar order is limited to the treatment if
5 disclaimed state law avoidance claims under the bar order.

6 So let me just talk about that for just a minute
7 or two. Consistent with other changes in the DCL plan, the
8 bar order has been amended to reflect the fact that state
9 law constructive fraud claims versus shareholders which we
10 call the disclaim state law avoidance claims are not
11 released by the DCL plan. Accordingly, the bar order now
12 expressly states "Bar claims shall not include any claim for
13 non-contractual indemnity or contribution against any
14 released party solely in its capacity, if any, as a selling
15 shareholder."

16 So just to be clear about what this means. If a
17 selling stockholder gets sued and then wants to sue another
18 stockholder for contribution in that parties capacity as a
19 stockholder, the selling stockholder can do that under our
20 bar order. It does not -- that action, that claim for
21 contribution is not restrained even for released parties who
22 have settled all other claims against them.

23 But I think what Mr. Pachulski and perhaps others
24 are arguing is that this is not enough. This carve out, if
25 you will, is not enough. In their view, in Mr. Pachulski's

1 view, the bar order should not apply in an action asserting
2 a disclaim state law avoidance claim under any
3 circumstances.

4 In other words, they're arguing that if they
5 bring a constructive fraud claim against a shareholder, than
6 that shareholder should be able to claim over against a
7 release party for contribution not only in that parties
8 capacity as a selling stockholder for which liability has
9 not been released and we concede that such a lawsuit is not
10 precluded by the bar order, but even on account of liability
11 for which the released party already paid to settle under
12 the plan and we disagree with that view and let me just
13 flesh it out for another moment.

14 By failing to assert a very narrow universe of
15 claims, in other words, the state law constructive fraud
16 claims against the shareholders, that's the only thing
17 that's been disclaimed under the plan, those narrow claims
18 reverted to or are in the hands of, use whatever term, to
19 individual creditors. But only those claims are in the
20 hands of individual creditors, nothing more than that.
21 State law constructive fraud claims against the lenders in
22 their lender capacities were asserted by the estate under
23 544(b) on behalf of all creditors and are proposed to be
24 released under this plan in exchange for the consideration
25 that we're providing under the settlement.

1 And obviously, it's hotly debated as to whether
2 that consideration is enough, is adequate for the claims
3 that are being released. But the bottom line is the estate
4 had the authority to assert those claims and it exercised
5 that authority with respect to our lender capacity and those
6 claims are proposed to be settled under the DCL plan for the
7 settlement consideration that's being paid.

8 Brigade would have no right to bring those
9 settled claims directly against the released parties. And,
10 therefore, should have no right to recover indirectly on
11 account of any contribution claims in respect of that same
12 form of liability. In other words, what I think that
13 Brigade is arguing and they may not be doing this
14 intentionally, but what I think Brigade is arguing is that
15 they should have the right to do indirectly what they cannot
16 do directly. They want to be able to sue a shareholder and
17 then allow that shareholder to sue a lender in its capacity
18 as a lender for contribution even though that lender has
19 already paid for a release in respect of its lender
20 liability on state law avoidance claims against -- that were
21 asserted against the lenders. And that we would suggest
22 would permit a classic double recovery for Brigade or for
23 anyone asserting those claims. They would be recovering
24 once on the part of the settlement.

25 Let's not forget that Brigade is getting recovery

1 as part of our settlement. They debate that it's enough,
2 but they are getting a recovery under our settlement. And
3 then we would pay them again in our capacity as a lender
4 through the exercise of the contribution claims. We would
5 pay the defendant who is asserting the contribution claim
6 against us and then those funds would be used to satisfy the
7 judgment against that non-settling defendant. And so we
8 believe it would be two recoveries and that and only that is
9 the aim that the DCL plan and the bar order in it is trying
10 to frustrate.

11 Again, we have amended the DCL plan to make clear
12 that the bar order does not protect a release party in the
13 event a contribution claim is brought against it solely in
14 its capacity as a selling stockholder. And that is because
15 seeing shareholders were not released under the plan. So to
16 the extent we're also a selling shareholder, we didn't pay
17 for a release in that capacity and we're not entitled to the
18 protections of the bar order in that capacity. But where
19 we've paid for a release such as JP Morgan in connection
20 with its lender capacity, we should not continue to face
21 exposure in our lender capacity of those state law claims
22 when they were held by the estate were settled for a
23 consideration and that -- then the adequacy of which is
24 before the Court, but that is part of the proposed
25 settlement.

1 MR. PACHULSKI: Your Honor?

2 THE COURT: Mr. Pachulski, if you've been
3 listening, what I've been doing is not hearing rebuttals but
4 --

5 MR. PACHULSKI: It's just -- I want to clarify
6 something because most of this argument was responding to an
7 argument that I didn't make. And so my position hasn't -- I
8 don't intend to go through a full rebuttal. All I'd like to
9 do is clarify my position because it seems to have been
10 misunderstood.

11 THE COURT: Well let's wait until Mr. Moskowitz
12 is done.

13 MR. PACHULSKI: Okay. I'm sorry, I thought he
14 was done.

15 THE COURT: He was just taking a breath.
16 (Laughter)

17 MR. MOSKOWITZ: I'm nearly done, Your Honor,
18 actually. Let me just review my notes, but while I review
19 my notes, I would suggest that an exception not be made with
20 respect to Mr. Pachulski and -- because if you're going to
21 allow rebuttals in one case, we should allow them in all.

22 MR. PACHULSKI: So if someone misstates my
23 position, I can't respond?

24 THE COURT: Just wait a minute, Mr. Pachulski.

25 MR. PACHULSKI: All right.

1 THE COURT: Until Mr. Moskowitz tells me he's
2 done.

3 MR. MOSKOWITZ: Okay. That's all I have for now,
4 Your Honor.

5 THE COURT: All right, thank you. Mr. Pachulski,
6 you may have two minutes.

7 MR. PACHULSKI: Just to clarify, we have never
8 taken the position that as one way or the other as to
9 whether a bar order can or cannot be entered between
10 settling defendants and non-settling defendants. We don't
11 have a dog in that fight. Our position was -- simply had to
12 do with the application of the judgment reduction provisions
13 to our claims as plaintiffs. So as far as whether one -- a
14 settling defendant can sue a non-settling defendant or not,
15 we've never -- we don't have a position one way or the other
16 on that. And our sole objection is limited to the
17 application of the judgment reduction provisions, not the
18 bar order, but the judgment reduction provisions to the
19 claims that are not owned by the estate. That's it.

20 THE COURT: Thank you.

21 MR. STEEN: Good afternoon, Your Honor. Jeffrey
22 Steen, Sidley Austin on behalf of the debtors.

23 And the let the record reflect that the fact that
24 I had to practically climb over three or four of my
25 colleagues to take the podium says nothing about the

1 popularity of this provision. But in light of the vigor of
2 the objections --

3 THE COURT: I'm sure the fee applications will
4 reflect that as well.

5 (Laughter)

6 MR. STEEN: Thank you, Your Honor. In light of
7 the vigor of some the objections that have been raised to
8 the bar order today, and in particular, the focus of
9 Brigade's objection, we thought it would be useful to the
10 Court to briefly supplement the remarks of Mr. Moskowitz to
11 flesh out the debtors' perspective on this provision.

12 And, Your Honor, what I'd like to do is direct
13 the Court's attention to the third decretial paragraph of
14 Section 11.3. And it's actually on Page 88 of the second
15 modified DCL plan that was lodged with the Court on April 5.
16 And that provision, Your Honor, that paragraph is very
17 brief, but that basically contains a number of restrictions
18 and limitations that we think are very important and we
19 think have a direct bearing, if not dispositive bearing on
20 the objection raised by Brigade and others. Does Your Honor
21 have a copy of that plan?

22 THE COURT: I do.

23 MR. STEEN: Oh, thank you very much. In
24 particular, Judge, we think that the exclusions in the third
25 decretial paragraph of Section 11.3 protect any individual

1 creditors who may bring any disclaimed state law
2 constructive fraudulent transfer claims or any selling
3 shareholders that may be defendants in any of those disclaim
4 causes of action. And we'd like to briefly highlight two
5 points.

6 First, by its terms, Section 11.3 and Mr.
7 Moskowitz actually made this clear, but if we take a look at
8 the first sentence of the third decretial paragraph on Page
9 88 of the plan, Section 11.3 applies by its terms only to
10 claims of contribution or non-contractual indemnity. And so
11 to use a specific example, if any non-settling defendant
12 such as a selling Step 1 or Step 2 shareholder is sued on
13 account of the pre-petition leveraged buyout and that
14 defendant has any claim over against any released party that
15 is a direct claim or that is a non-derivative claim or that
16 is a personal cause of action that does not sound in
17 contribution or non-contractual indemnity, than that claim
18 is preserved and it's not subject to the provisions of the
19 bar order and it's not subject to the judgment reduction
20 provisions in that bar order.

21 And so specifically, it's our view, Your Honor,
22 the company's view, that with respect to state law
23 constructive fraudulent conveyance claims of the type that
24 are the basis of Brigade's objection, the law is pretty
25 clear that those claims do not give rise to contribution

1 claims. And there are several cases that hold this, Your
2 Honor. I'm just going to mention a couple. The leading
3 case is out of Tribune's neck of the woods, out of the
4 Northern District of Illinois, it's the *Wiebolt's* opinion
5 which is reported at *111 Bankruptcy Reporter 162*. That's a
6 decision by the Judge, District Judge Holderman in 1990.
7 And more recently, Judge Shannon in 2009 issued a similar
8 holding in the *Amp'd Mobile* decision which is reported at
9 *404 Bankruptcy Reporter 118*.

10 And those decisions are well reasoned and they
11 make sense. And they hold that in contrast to tort claims,
12 the legislative theory animating fraudulent transfer law is
13 cancellation or avoidance of the challenged transfer. In
14 other words, the nature of the relief sought is
15 recessionary. It's not the imposition of liability for
16 money damages based upon the consequences of a wrongful act
17 or tort which as we know is the basis of tort law. And so
18 those cases and many cases cited by those decisions in law
19 review articles conclude that constructive fraudulent
20 transfer claims brought under the UFTA, the UFCA, or state
21 law do not give rise to contribution or non-contractual
22 indemnity.

23 And so our view, Your Honor, on behalf of the
24 company is that even if this Court has jurisdiction to enter
25 the bar order with respect to disclaimed state law

1 constructive fraudulent transfer claims, that as a practical
2 matter, the terms of this bar order would not apply to those
3 claims and would not prejudice the rights of either the
4 plaintiffs, the individual creditors asserting those claims,
5 or any of the selling shareholder defendants under those
6 claims.

7 I have one more point, Your Honor. If we look
8 back at this third decretial paragraph, Clause 2 in the
9 second sentence makes clear that the bar order by its terms
10 does not apply to any claim or any cross claim or any third
11 party claim for which there's no joint liability as between
12 the non-settling defendant on the one hand and the release
13 party on the other hand. Now as I said, this exclusion is
14 made clear in Clause 2 of the third decretial paragraph of
15 Section 11.3 in that provision and that exclusion has been
16 in the bar order since last October.

17 Now we do not believe, Your Honor, for the same
18 reason I just discussed with respect to the first point
19 about contribution claims that under applicable non-
20 bankruptcy law, any of the disclaimed state law constructive
21 transfer claims would give rise to joint liability as
22 between the selling shareholders, the selling Step 1 or Step
23 2 shareholders on the one hand and any of the parties that
24 paid considerable consideration to settle their claims under
25 the DCL plan. And those claims simply do not sound in tort.

1 They do not give rise to money damages for which multiple
2 tort-feasors can be found jointly liable. And, therefore,
3 it our view that under the four corners of the bar order as
4 proposed in the DCL plan, the judgment reduction provisions
5 in that order would not apply to those kinds of claims.

6 Our analysis, Your Honor, of the counts, the
7 multiple counts and causes of actions, the avoidance claims
8 that were actually brought by the committee on behalf of the
9 estate in December of last year before the expiry of the
10 statute of limitations, we would apply a similar analysis
11 and focus on whether those claims would give rise to
12 contribution claims under non-bankruptcy law and whether
13 those types of claims would give rise to joint liability.
14 And without going through the litany of all those claims and
15 causes of action, we can tell Your Honor that on behalf of
16 the company, it's our conclusion that many, if not most of
17 the counts and claims in the community complaint for similar
18 reasons would fall within one of these exclusions, the joint
19 liability or non-contribution and non-indemnity exclusion in
20 Section 11.3.

21 And, Your Honor, unless you have any additional
22 questions, I'm glad to yield the podium.

23 THE COURT: I do not.

24 MR. STEEN: Thank you.

25 THE COURT: Are we ready to move on to Wilmington

1 Trust?

2 MR. STARK: Your Honor, I'm bringing my bottle of
3 water, but I know Your Honor's rule about that if I --

4 THE COURT: The only rule is don't spill it.
5 (Laughter)

6 MR. STARK: If I spill it, I buy you a new
7 podium. I think we've had this colloquy before. Give me a
8 minute.

9 For the record, Robert Stark from Brown Rudnick
10 on behalf of Wilmington Trust, the successor indenture
11 trustee for the PHONES.

12 Now, Your Honor, this is the time to talk about
13 PHONES' specific legal issues. And I appreciate this
14 opportunity. Your Honor's tired, you've heard a lot and I'm
15 not going to abuse it. Also, we do fold in with the Akin
16 Gump team and the co-plan proponents and their leadership in
17 the collective arguments and I'm not going to be reiterating
18 or advance previewing any of them for you. I'm sensitive to
19 Your Honor's needs in that regard.

20 Furthermore, the DCL plaintiffs and, excuse me,
21 the DCL plan proponents in their amendments obviated one of
22 my issues. They've clarified that Wilmington Trust's claims
23 for its own fees and professional costs is not apparent --
24 is now a parent level general unsecured claim and not a
25 subordinated PHONES claim so we have one issue left to talk

1 about.

2 And two of the other objections that were raised
3 or points that were raised in my objection are indeed
4 factual in nature and acknowledge it as such and should be a
5 closing when we talk about evidence. And that's whether
6 depending upon the valuation, enterprise valuation, trade is
7 receiving an appropriately better treatment than the PHONES
8 holders. It does invoke contractual subordination issues,
9 but it's really a valuation issue.

10 And second, whether the banks can enjoy
11 contractual subordination under the terms of our indenture
12 when evidence shows a lack of good faith in the transactions
13 that they hereby assert in their claims. So we'll defer
14 those arguments again for another day. That leaves us with
15 two arguments, Your Honor. And sadly, they are meaty ones
16 and they're a little involved, but I'll try to be engaging
17 as I can.

18 THE COURT: Oh, you're always engaging, Mr.
19 Stark.

20 MR. STARK: Good. I'm glad to hear that. Thank
21 you, Your Honor.

22 The first is does the DCL plan architecture
23 properly invoke the contractual subordination provisions of
24 the PHONES indenture and to walk through that contractual
25 subordination. And the second, does the DCL plan

1 inappropriately infringe upon our legal rights, Wilmington
2 Trust's legal rights, on behalf of the PHONES noteholders,
3 as a private litigant against non-debtor third parties. And
4 we've heard a little bit about the bar date order. I won't
5 touch upon that too much, but we have some other issues.
6 Let me take each of them in turn.

7 First, contractual subordination. So what does
8 the plan provide? We do not receive any of the 431 million.
9 The settlement funds that's being reserved exclusively for
10 the senior noteholders, we get exclusively subordinated
11 rights to litigation recoveries through a trust vehicle.
12 There's a fair amount of stacked definitions that ultimately
13 gets you to what the distribution rights are.

14 I'm happy to walk Your Honor through it, but I
15 think we probably all can -- know what it is and can cut
16 through it. So if you'll allow me to paraphrase it, I'll do
17 my best.

18 As I see, for the stacked definitions, all the
19 LBO causes of action are put in a trust. Unsecureds get, I
20 believe, the first net 90 million, and then they get 65
21 percent of the next -- net proceeds thereafter. The banks
22 get the 35 percent net proceeds. The PHONES get a pro rata
23 slice -- pro rata allocation of the unsecured part. But of
24 course, we don't get to keep it.

25 Section 1.1.44 on page 7, that's the definition

1 of Class 1J trust interests. It provides -- and again, I'll
2 paraphrase, but we can go through whatever language issues
3 you'd like, Your Honor. The PHONES turn over all such
4 rights of distribution to senior noteholders and anyone else
5 claiming contractual seniority, meaning the banks. And this
6 marries, I guess, with Section 7.15, which states that the
7 DCL plan proponents, it's their intention to honor
8 contractual subordination against the PHONES to the fullest
9 extent possible.

10 Okay. We understand their deal. But is it
11 right? We don't think so. We don't so absent consent.
12 We've certainly consented to certain treatments in our own
13 plan. That may be somewhat prejudicial in terms of what the
14 arguments are, but it's our plan. And they impose upon us,
15 cram-down-wise, under 1129(b), a form of contractual
16 subordination that we think is inconsistent with our
17 document. We don't think they can.

18 I ask Your Honor to turn, respectfully, to the
19 indenture itself. It's the exhibit to our objection. If
20 Your Honor doesn't have a copy handy, I'd be happy to give
21 you one.

22 THE COURT: Well, I'm sure it's up here
23 somewhere, but it would be handier if you could give one to
24 me and to my law clerk.

25 MR. STARK: Okay. May I approach?

1 THE COURT: You may. Thank you.

2 MR. STARK: Now, subordination has its own
3 article. It's Article 14, and the principle provision is
4 1402, and that's on page 62.

5 THE COURT: Go ahead.

6 MR. STARK: Okay. Now, I'll paraphrase it,
7 because it is lengthy. Again, we can read it into the
8 record, but upon distribution of assets of the company in a
9 bankruptcy, a wind-up, or assignment for the benefit of
10 creditors under state law, we have an A and a B. A is
11 senior indebtedness is entitled to full payment before
12 PHONES receive repayment that they're entitled to under
13 Section 3.10 of the indenture, the company's repayment
14 obligations, and B, any distribution "of assets of the
15 company", shall be turned over to holders of senior
16 indebtedness.

17 The following sections of Article 14 sort of
18 reiterate and follow the same philosophical conceptual
19 architecture. Contractual subordination, and thus
20 distribution turnover, pertains exclusively to distributions
21 of "assets of the company". The company, by the way, is
22 defined on page 1. And on page 1, we see that the company
23 is Tribune Company. It's not its bankruptcy state. It's
24 certainly not its bankruptcy state as it may be augmented by
25 Chapter 5 causes of action or strong-arm rights taken from

1 creditors and bestowed upon the debtor-in-possession. And
2 that's even though Article 14, all over the place, talks
3 about, extensively, what's supposed to happen in a
4 bankruptcy scenario.

5 And tellingly, the indenture also contemplates
6 third-party recoveries. If Your Honor will look, please at
7 5.10 of the indenture. That's on page 32. This is the
8 cumulative remedies provision. And the cumulative remedies
9 provision, like all indenture of cumulative remedy
10 provisions, says, "The indentured trustee, on behalf of the
11 PHONES noteholders, have rights under this indenture. They
12 may be asserted. They may be asserted in bankruptcy. They
13 may be asserted in any sort of non-bankruptcy forum."

14 THE COURT: Mr. Stark, I'd ask you to pause,
15 because I'm --

16 MR. STARK: You're not finding it?

17 THE COURT: I've got page 32.

18 MR. STARK: Page 34. Excuse me.

19 THE COURT: I'm sorry. Okay.

20 MR. STARK: I may have misspoken.

21 THE COURT: All right. Thank you.

22 MR. STARK: Okay. "And the indenture trustee has
23 any other rights that may exist in the law or in equity."
24 And that's anyone. So clearly, this contract contemplates
25 trustee recoveries from third parties, but explicitly

1 provides only for turnover of company assets distributed in
2 a liquidation scenario but not third-party recoveries. Now,
3 if the DCL proponents would concede that the parent level
4 unsecureds are the fulcrum class, and so we're really here
5 discussing about a distribution of enterprise value -- sort
6 of in the form of cash, debt, stock, et cetera -- I'd have
7 little to argue. These are clearly assets of the company,
8 and I'd have to turn them over.

9 But all the proponents claim -- all the DCL
10 proponents claim is that the banks are the fulcrum, that
11 they are guaranteed claims at the subsidiary, soak up all
12 the value, and if there's nothing really for parent company
13 creditors, but for their settlement that they're willing to
14 give up. And it's settlement with all of the creditor
15 constituencies and the creditors committee and the
16 settlement of their claim exposure. Now, the claims that
17 have been -- that we talk about, some of them may be "assets
18 of the company" but probably not the strong ones, because of
19 in *pari delicto* and other defenses, the powerful claims, so
20 says Mr. Klee [ph], of the creditor claims -- those arising
21 under state law, those that were strong-armed to the debtor,
22 those that now have been reverted back to -- at least in
23 constructive fraudulent conveyance terms -- these pre-LBO
24 creditors, like Wilmington Trust on behalf of the holders.
25 Or they arise under Chapter 5 avoidance theories.

1 The long -- the law has long held, and Mr. Klee
2 expanded on, at great length in his report, and the 3rd
3 Circuit confirmed in Cybergenics cited in our brief, that
4 strong-arm and Chapter 5 claims do not belong to the
5 company. They belong to creditors. The debtors, and here
6 the official committee, only is given standing to assert
7 them in a trustee capacity on behalf of others, other
8 creditors, but they are not assets of the company. So, some
9 unknown, unquantifiable -- at least by me -- portion of the
10 431 million that's being given up to senior noteholders on
11 account of the strong Chapter 5 -- the strong strong-arm
12 claims that the estates are asserting but belong to me, some
13 portion of that 431 million does belong to the PHONES
14 noteholders. They're assertable by the trustee, absent a
15 bankruptcy case. And under applicable law, they belong to
16 the creditors. And they're not to be turned over, under my
17 indenture. They are to be delivered to the PHONES
18 noteholders. Again, if we were to consent to a different
19 mechanic, as we have done in our plan, that would be a
20 different story. But it can't be imposed upon us.

21 Besides the 431 million, the plan architecture is
22 all wrong. Our slice of litigation recoveries are not to be
23 turned over to senior indebtedness. These are third-party
24 recoveries. We are to share in them *pari passu*. So this
25 plan violates our claim rights. It overextends contractual

1 subordination beyond what the document provides for. I
2 think the rule of explicitness still applies in connection
3 with subordination issues, so it violates our rights under
4 502(a). It overextends beyond the limitations of 510(a),
5 and thus, the plan violates 1129(a)(1). If the plan
6 violates other provisions of the bankruptcy code, it can't
7 be proposed in good faith. It has to be violative of A(3).
8 Certainly, it violates the best interest test if it takes
9 away my entitlement. And most assuredly, under 1129(b),
10 it's not fair and equitable.

11 I think that takes me to my second major
12 objection point, Your Honor, and that's does the DCL plan
13 inappropriately infringe on our legal rights as a private
14 litigant against non-debtor third parties. And we think so.
15 There are two lawsuits at issue here. We have our
16 constructive fraudulent conveyance claims against the
17 stockholders, and that's the bar order discussion we had
18 earlier. And we have our separate adversary proceeding
19 against the banks, and we'll talk about them in turn very,
20 very quickly.

21 I don't want to belabor the point on the bar
22 order, but to the extent we sue shareholders, they sued
23 JPMorgan for contribution indemnity, I fail to see -- and I
24 can't believe I listened to all this conversation but nobody
25 ever addressed it -- how Your Honor has jurisdiction to

1 impose that kind of fee-sharing arrangement between the
2 shareholder defendants in my litigation versus JPMorgan.
3 They may claim unfairness all over the place. They chose
4 not to settle with us. That's their choice, but Your Honor
5 has marathon limitations. Those don't enable you to enter
6 the bar date that they ask for.

7 And one further point on that. You can't just
8 sort of call it a settlement and violate the law. The 2nd
9 Circuit dealt with that in Iridium. The law is the law.
10 Calling something a settlement doesn't get you out of it.
11 And if you're going to call it a settlement, I didn't get
12 anything in the settlement. The senior noteholders got all
13 the funding, so for Mr. Moskowitz to come up and say, we
14 bought peace, not with me.

15 Let me take -- let's take a quick turn to the
16 second lawsuit, Your Honor. Our adversary proceeding
17 against Citicorp and the banks was filed here on March 4,
18 2010. It's been around for quite a while, and as sort of
19 dropping a footnote for calendar observation purposes, in
20 eight days, Your Honor, it will be the one-year anniversary
21 of Your Honor's order appointing Mr. Klee as examiner. We
22 seem to have learned so much and so little at the same time.

23 Our lawsuit against Citicorp emanates from the
24 LBO, but it is particular to the PHONES noteholders. It
25 hasn't been before Your Honor in quite a while, not by our

1 choice, so let me just give you a really quick summation of
2 what it is.

3 In 2007, Citicorp was the PHONES indenture
4 trustee. In 2007, at the same time it was our indenture
5 trustee, it was a primary advisor to Tribune on the
6 structuring and the architecture of the leverage buyout.
7 The complaint alleges that Citicorp violated duties to the
8 PHONES holders, including especially the duty of loyalty,
9 and that the other banks knew all about this. In fact, it
10 was -- it's all in the report itself. And they aided and
11 abetted that violation. And we sought in that complaint,
12 among other forms of relief, claims disallowance under
13 Section 502(a), and the theory for that was unclean hands,
14 under applicable federal law, and also equitable
15 subordination at the parent company level, pursuant to
16 510(c).

17 And I've long wanted to litigate this cause of
18 action. In fact, Your Honor may recall. You and I had a --
19 kind of a fun colloquy, I was trying to find it just
20 preceding the hearing, where I said, Judge, I really want to
21 litigate this. And you said, nobody ever doubted your
22 eagerness, Mr. Stark. And I also said at that hearing,
23 there'll be a day of reckoning by the decision on this side
24 of aisle for not letting me litigate that.

25 The 5th Amendment's a pesky thing, Your Honor.

1 I'm entitled to due process. I'm entitled to due process,
2 even if it's inconvenient for their plan constructs. The
3 Court cannot, consistent with the Constitution, confirm a
4 plan that whisks away my lawsuit, as if it didn't happen,
5 without affording me my day in Court. You cannot do that.
6 And I think that's true, even if they don't think all that
7 much of my lawsuit.

8 Frankly, I think, going back, again, a year ago,
9 they then didn't think an awful lot about the fraudulent
10 conveyance claim against step two. I expect the usual
11 retort: "Judge, you can't hold up the plan over this
12 lawsuit. It's been sitting." I answer you can, and you
13 must. And frankly, we do it all the time.

14 Let me tell you what I mean by that. Let's think
15 of a basic, plain vanilla, widget manufacturing debtor. It
16 files for bankruptcy. It files a plan of reorganization,
17 and it's going to convert the unsecured debt into a stock.
18 Simple. Debtor's books and records reflect a \$1 billion
19 unsecured aggregate liability amount, but unsecured
20 creditors have filed claims totaling 3 billion. We don't
21 delay confirmation until the claim's disputes are resolved.
22 We don't do claims reconciliation to completion for
23 confirmation and consummation. We exit bankruptcy and we do
24 it in the usual way. We distribute one-third of the stock
25 to the 1 billion in allowed claims, and we reserve two-

1 thirds of the stock pending litigation outcome or
2 settlement. That's what we do. Everyone gets due process.
3 If the creditors, who have asserted the 2 billion in excess
4 over the books and records, if they don't settle, they get
5 their day in Court. The same for the debtor.

6 The DCL plan takes this right away from me,
7 because the claims are allowed in a stipulated amount, and
8 the distributions are made for the claims allowance without
9 affording me the opportunity to litigate, notwithstanding
10 the fact that I virtually begged to allow to litigate it.

11 Your Honor, their plan is inconsistent with the
12 law. It's inconsistent with what we do in bankruptcy. But
13 there's another plan before you that is consistent with the
14 law, and that widget manufacturer's traditional plan of
15 reorganization. That's our plan. Their plan can't be
16 confirmed, Your Honor.

17 I don't know if you have any questions for me.

18 THE COURT: I do not. Thank you, Mr. Stark.

19 MR. JOHNSTON: Your Honor, I'd like to ask for a
20 five-minute recess. Mr. Stark articulated his primary
21 argument, which is nowhere to be found in his brief, and I'd
22 just like to organize my thoughts for a few minutes.

23 THE COURT: Well, it's about time anyway. We'll
24 take a five-minute break.

25 MR. JOHNSTON: Thank you.

1 (Recess at 3:57 p.m. to 4:09 p.m.)

2 THE CLERK: All rise.

3 MR. JOHNSTON: Thank you, Your Honor. For the
4 record, again, Jim Johnston of Dewey & LeBoeuf on behalf of
5 Oaktree and Angelo Gordon as proponents or co-proponents of
6 the DCL plan. I appreciate the break, Your Honor, because
7 it allowed me to confirm specifically what I had suspected
8 when I was hearing Mr. Stark's argument, and that is, in
9 fact, that the first argument he laid out for you is nowhere
10 in his brief and, in fact, is a brand-new argument.

11 The objection by Wilmington Trust is filed at
12 docket 7996, and it lays out four arguments to confirmation
13 of the DCL plan. The second argument previewed in the
14 preliminary statement at paragraph one says that the DCL
15 plan provides the PHONES with a lower recovery than it would
16 receive in a Chapter 7 liquidation by A, subordinating the
17 PHONES to trade indebtedness and retiree claims against
18 Tribune Company and inter-company claims of Tribune
19 subsidiaries. I think we heard Mr. Stark reserve that
20 argument for later advancement. And B, wrongly assuming
21 that the PHONES are subordinated for the purpose of
22 allocating distributions from the creditors trust contained
23 in that plan when the purported payment subordination of the
24 PHONES does not extend to payments from entities other than
25 Tribune Company.

1 Now, that is related to what Mr. Stark argued
2 today, but it is an argument that was strictly limited to
3 payments from the creditors trust under the DCL plan, which
4 Mr. Stark argued in his objection are not subject to the
5 PHONES subordination provisions. This argument is laid out
6 in section 2 of the brief, starting at paragraph 7, and in
7 particular, paragraphs 11 through 17. The argument
8 concludes, driving home the point that it is strictly
9 limited to distributions from the creditors trust at
10 paragraph 16, where Wilmington Trust concludes: "According,
11 the subordination provisions in the DCL creditors trust
12 agreement does not apply to those holders of the PHONES who
13 purportedly contributed their individual claims to the DCL
14 creditors trust and are entitled to receive their
15 unencumbered pro rata share of the DCL creditors trust along
16 with other creditors holdings, state law, constructive
17 fraudulent conveyance claims who contribute claims to the
18 DCL creditors trust with no pay-over obligation." And it
19 continues in paragraph 17: "Since the DCL plan proposes to
20 enforce contractual subordination of the PHONES,
21 notwithstanding the fact that distributions from the DCL
22 creditors trust are effectively a return of proceeds of
23 direct litigation on behalf of PHONES, it fails the best
24 interest of creditors test by providing the PHONES with less
25 than they would receive in a Chapter 7 liquidation."

1 We took that objection to heart. As a matter of
2 fact, we thought that our plan the first time around did not
3 provide for the PHONES to be subordinated to creditor stress
4 recoveries if that's not what the PHONES indenture provided,
5 but we wanted to make it crystal clear. So in the chart
6 that we filed last Friday, at document 8607, listing the
7 objections or outstanding objections to the plan, we
8 discussed the Wilmington Trust objection -- let me find the
9 page here -- on page 14. And with respect to this
10 objection, we noted that Wilmington Trust objects to the
11 application of contractual subordination to the creditors
12 trust proceeds, payable to holders of Class 1J creditors
13 trusts. And we said that we were going to amend Class 1J --
14 amend the plan to provide that the Class 1J creditors trust
15 interests are not subject to PHONES subordination, to the
16 extent that they -- that the indenture does not so provide.
17 And we noted that we believe that this resolved the
18 Wilmington Trust objection. And there's language appended
19 to that document that has proposed plan resolutions. And we
20 also pointed out in our brief that it was never our
21 intention to subordinate PHONES -- creditors trust
22 recoveries to the PHONES to the extent that the indenture
23 did not so provide.

24 Apparently, having resolved that objection,
25 Wilmington Trust decided that it needed to raise a new one,

1 which is what you heard today, which has never been
2 articulated before. The argument you heard today, as best I
3 understand it, was that somehow the settlement of estate
4 causes of action embodied in the DCL plan contained a
5 component of state law fraudulent conveyance claims and that
6 that component of recoveries in the settlement is not
7 subject to the PHONES subordination provisions.

8 Your Honor, I'd love to address that argument.
9 I'm not prepared to address it today, because it's never
10 before been articulated, other than to know that it's wrong.
11 It's wrong under the terms of the indenture, and it's wrong
12 under the bankruptcy law. The recoveries or the state
13 causes of action that are settled under the DCL plan clearly
14 are estate property, and by virtue of them being estate
15 property, they are subject to the PHONES subordination
16 provisions. The PHONES indenture could not be clearer. It
17 says they -- the subordination provisions apply to any
18 distribution of assets of the company, and then it goes on
19 at some length to describe how and why and the ways and the
20 extent to which the PHONES are subordinated.

21 It's crystal clear that proceeds of avoidance
22 actions in a bankruptcy case are assets of the debtor, and
23 those assets of the debtor are then subject to contractual
24 subordination agreements. I would venture to guess, and I
25 know that none was cited in the brief and no authority was

1 cited by Mr. Stark today, that there's not a single case out
2 there that provides that avoidance actions or proceeds of
3 avoidance actions recovered by a debtor in a bankruptcy case
4 are not somehow property of the estate and assets of the
5 company. So, I'm handicapped by the inability to respond to
6 an argument that had not been articulated before. I think
7 I'll leave it at that for now.

8 With respect to the last argument that there are
9 due-process concerns that Wilmington Trust filed a complaint
10 against certain lenders, against Citibank back on March 4,
11 2010, and that this plan harms that complaint in some way,
12 there's just no issue here, and we made this clear in our
13 brief as well. From the beginning, we've stated that the
14 DCL plan only settles and resolves estate causes of action.
15 To the extent that the Wilmington Trust complaint has --
16 asserts or alleges personal causes of action, causes of
17 action that do not belong to these bankruptcy estates,
18 Wilmington Trust will remain free to assert them, no matter
19 how frivolous they may be. The only claims settled under
20 the DCL plan are estate plans and causes of action. With
21 that, all of Mr. Stark's due-process concerns, procedural
22 concerns fall away. Confirmation of our plan will not
23 impact any of the causes of action asserted in that
24 complaint to the extent that they are personal.

25 THE COURT: Thank you.

1 MR. JOHNSTON: And I believe Mr. Moskowitz has
2 something to say about the new arguments raised by Mr. Stark
3 on the bar order. Otherwise, that's all that I have.

4 THE COURT: All right.

5 MR. STARK: Your Honor, I know there's no
6 rebuttals, but I have just been attacked for making stuff
7 up, and it's all clear. I'm happy to walk through it in the
8 brief, and Your Honor can read the objection, but I don't
9 think that's --

10 MR. JOHNSTON: Your Honor, I would invite you to
11 read the objection; it's not there in the brief at all.

12 THE COURT: Well, let me hear from Mr. Moskowitz.

13 MR. MOSKOWITZ: Good afternoon, Your Honor.
14 Elliot Moskowitz for JPMorgan. I will be exceedingly brief.

15 Mr. Stark levied a glancing blow at the bar order
16 in his argument, and I'm just going to levy a glancing
17 response.

18 First of all, his argument with respect to the
19 bar order also was absent from his brief, except for one
20 line that carries over from pages 13 to 14, nor was it the
21 subject of any other pleading that's been submitted to the
22 Court.

23 Having said that, I just want to correct one
24 thing for the record, or amplify it. Mr. Stark complains
25 that we did not settle with him, we did not settle with the

1 PHONES, and he's receiving nothing under the settlement. I
2 think it's probably more accurate to say, and it's helpful
3 to the analysis, that we did settle with him in the sense
4 that we have a settlement of the estate causes of action
5 that the estate has brought that is being -- that is before
6 the Court. And we've settled those causes of action,
7 including state law avoidance claims. In our capacity as a
8 lender, the money will flow into the estate or money would -
9 - is remaining in the estate as a result of those causes of
10 action. He may not get those monies ultimately because of a
11 separate contractual document that provides for him being
12 subordinated to the notes, but it's not a fair
13 characterization, I think, to say that there's no settlement
14 with his causes of action as part of the DCL plan.

15 That's all I have to say, Your Honor.

16 THE COURT: Thank you. Mr. Stark, I'll give you
17 a minute.

18 MR. STARK: Cybergenics is cited on page 14. The
19 -- it acknowledged the fact that there was mention in the
20 brief about the implications of the DCL plan in our separate
21 litigation. In fact, it's a whole section. I'm sorry that
22 my advocacy didn't marry up specifically to what they
23 intended to say on rebuttal. It's just how I argue. Your
24 Honor, yes, in fact, we were focused on the creditors trust,
25 but the mechanic is the same. And in fact, we never

1 actually gave to the creditors trust when we ultimately
2 delivered, but the theory and the arguments all are the same
3 respective the litigation trust versus the creditors trust.
4 It's a C versus an L situation.

5 THE COURT: Thank you. Okay. Are we ready to
6 move onto the PHONES?

7 MR. SIEGEL: Martin Siegel of Brown Rudnick on
8 behalf of Wilmington Trust as successor indentured trustee
9 for the PHONES.

10 I rise, Your Honor, because this is our motion
11 for estimation and classification of certain of the PHONES
12 claims. And I'll be brief, because counsel for certain of
13 the noteholders will argue their respective positions. what
14 I want to sort of walk the Court through are what I call the
15 undisputed facts, because we think this can and should be
16 decided as a matter of law.

17 It's undisputed that the size of the PHONES
18 claims is either 760 million or a million one something.
19 The difference, approximately \$403 million, arises from the
20 fact that the PHONES had a provision where certain -- they
21 could be redeemed under certain circumstances for cash.

22 THE COURT: I remember.

23 MR. SIEGEL: And prior to the bankruptcy, \$403
24 million worth of PHONES were redeemed, or at least submitted
25 for redemption to the then-indentured trustee, Deutsch Bank.

1 Deutsch, through a certain mechanism, canceled those
2 certificates, but then Tribune didn't pay. The bankruptcy
3 interrupted the different timing issues. Some were
4 submitted that day. Some were submitted a week before, some
5 a month before, but it wasn't paid. Deutsch sent a letter
6 to Tribune, saying that, in light of the non-payment, we
7 want to withdraw, at least on behalf of certain holders.
8 Tribune wrote back and said, no; as far as we're concerned,
9 it was irrevocable. That was their election. So the way
10 the 760 comes up that's in the debtor plan is, I believe,
11 \$703 million worth of face amounts of unredeemed PHONES plus
12 the \$56 million that they should have paid but didn't pay
13 for the exchange.

14 As indenture trustee, we have an issue between
15 our holders, so Wilmington Trust takes no position on the
16 merits of the motion. There are representatives of redeemed
17 holders here and representatives of people who did not
18 redeem, so I'd like to just turn it over to them. As I
19 said, I think the facts that give rise to the dispute are
20 relatively undisputed. Nobody has raised any issues with
21 those facts, so we think that Your Honor, once it hears from
22 the various holders, can and should decide this as a matter
23 of law. Thank you.

24 MS. STAFFORD: Your Honor, Sarah Stafford,
25 Benesch Friedlander. Speaking on behalf of Barclays and

1 Waterstone is Jason Sanjana from Latham & Watkins, admitted
2 pro hoc.

3 MR. SANJANA: Your Honor, Jason Sanjana on behalf
4 of Barclays and Waterstone.

5 Mr. Rosenberg was here in January, and we went
6 through our arguments pretty carefully, and we briefed them,
7 so I won't belabor the point.

8 Two things to respond to just now. One, Deutsch
9 Bank was clear at the time that they did not cancel their
10 notes, and that would be consistent with the exchange notice
11 provisions that we cited to you, whereby the holders would
12 tender for redemption; the trustee would hold the notes --
13 withdraw them, but would only cancel them once the
14 transaction was consummated.

15 That's really the crux of our argument. We --
16 there was never any consideration paid. There was never
17 consummation of the transaction, so there was no exchange,
18 and these are just withdrawn, pending reissuance or whatever
19 other remedy is right. But there's really nothing in the
20 documents of the indenture or the note that says that the
21 act of simply submitting them changes their value
22 permanently.

23 One factual clarification from our response to
24 the motion, we had said that all of the notes held by
25 Barclays and Waterstone were tendered on the petition date.

1 A very small number, five percent, were actually tendered on
2 December 2. That's still within the 10 days that the
3 exchange notice speaks to, which is the time before --
4 within which the company can pay.

5 But in any case, at least clearly for the notes
6 tendered on the petition date, it would be impossible for
7 the company to pay. There's an impossibility that would be
8 a bar to consideration in the transaction.

9 And the result that we are seeking, that these
10 notes would be valued at their full value, is consistent
11 with the indenture documents, especially the exchange
12 notice, which was specifically crafted to provide for this
13 sort of situation. And it's also consistent with Wilmington
14 Trust's filed proof of claim. So I don't want to go through
15 the arguments again. I think our arguments on subordination
16 were clear. There's really a fundamental difference between
17 subordinating a claim for payment under a note with
18 subordinating a claim based on the sale of a note. And if
19 you look at the cases they cited, one was a stock exchange
20 that was going to be payment for an employment contract.
21 The stock exchange never happened. The other one was a
22 breach of a merger contract -- merger agreement. These are
23 the cases cited by Sutton Brook. And I think it's just not
24 consistent with the cases we cited that say if you were to
25 apply 510(b) subordination to payments under clear

1 provisions of a note, that would make any claim under a bond
2 based on default or in bankruptcy, really, a 510(b)
3 subordinated claim.

4 With that, I guess -- unless you have any
5 questions.

6 THE COURT: I don't. Thank you.

7 MR. GELBER: Good afternoon, Your Honor.
8 Lawrence Gelber of Schulte Roth & Zabel for Suttonbrook
9 Capital Management.

10 I agree: we shouldn't rehash everything that we
11 went over in January. But one point that Your Honor raised
12 in January I did want to address. You seemed to frame this
13 as a classification issue, which I don't think any of us had
14 really framed it as. I think our expectation -- and I think
15 I understand what you're saying is that if the exchanging
16 noteholders claims were to be subordinated, you would have
17 disparate treatment of -- you would have senior and
18 subordinated within the same class.

19 I think our expectation or our anticipation would
20 have been that had Your Honor -- or if Your Honor is to rule
21 that way, the plans could be modified accordingly to set
22 out, you know, a subordinated class for the exchanging --
23 could make a provision for the exchanging PHONES
24 noteholders.

25 More importantly, though, I think if the Court

1 determines that the appropriate amount of those claims is
2 \$56 million, you don't even need to get to the
3 classification issue, all right, because then you would just
4 have an additional -- as the debtors say, you would have
5 \$759 million in that single class: 703 of non-redeeming and
6 56 of redeeming. I think, just to remind the Court -- and I
7 think this is where the Court's primary focus should be, to
8 remind the Court, as we pointed out last time, it's our view
9 that the exchanging PHONES holders did everything that they
10 needed to do. They tendered. They signed and delivered the
11 exchange notices. The notes were DWAC'd out of DTC. That's
12 deposit/withdraw at custodian. Once they were DWAC'd out of
13 DTC, the trustee takes possession, and the debtor's books
14 are credited as if those notes are no longer in existence.
15 So the debtor's books would reflect that those notes are no
16 longer outstanding.

17 The exchanging holders did that with the
18 expectation of receiving \$56 million in exchange. They
19 bargained away the risk of non-payment under the PHONES
20 notes for certainty of a payment. Obviously, the bankruptcy
21 intervened, and they didn't receive that payment; yet, the
22 risk/reward analysis that they undertook was it was better
23 for them to exchange and seek the \$56 million than risk
24 continued payment under the PHONES at some point in the
25 future.

1 THE COURT: But timing is everything, isn't it?

2 MR. GELBER: It certainly is. Having eliminated
3 the risk, it seems to us that it's inequitable that they
4 would still get to reap the reward, although perhaps in this
5 case I don't know how much of a reward it will ultimately
6 be, but there is hope that there will be a substantial
7 distribution to the PHONES noteholders after the litigations
8 are resolved.

9 So at the point of the exchange, where they have
10 done everything that they needed to do, they have bargained
11 away that risk, and they shouldn't be entitled to that
12 reward. Just because the transaction was not completed,
13 that the consideration was not paid, doesn't mean that the
14 transaction is void. It means that they sold to -- their
15 security to the debtor, the debtor didn't pay for it, and
16 now they have a claim for the amount that they were due to
17 be paid on the sale of that security of the debtor, and
18 that's the \$56 million, not the face amount of those claims.

19 And unless Your Honor has any questions, I have
20 nothing further.

21 THE COURT: I don't. Thank you. Do either of
22 the plan proponents care to address? Okay.

23 MR. SANJANA: Not the DCL plan proponents, Your
24 Honor.

25

1 THE COURT: Okay. Does that bring us back to
2 Brigade?

3 MR. PACHULSKI: Thank you, Your Honor. Again for
4 the record, Isaac Pachulski of Stutman, Treister & Glatt,
5 for Brigade Capital Management. To make this hopefully
6 shorter than it might otherwise be, I'm not going to repeat
7 the various objections with the same detail as in our -- the
8 opening argument that we made, it was like about a month
9 ago, and I'll just incorporate that by reference. So my
10 silence on a point shouldn't be deemed a waiver, but there
11 are only -- there are two specific issues I would like to
12 address; namely, the plans violation of the requirement the
13 plan not discriminate unfairly, and the overpayment of the
14 swap claim in connection with converting Oaktree from a plan
15 opponent to a plan proponent. And again I will repeat what
16 I said in opening argument only to the extent necessary to
17 create context because there's some additional points I'd
18 like to establish for the Court regarding these two issues.

19 First with respect to the requirement that a plan
20 not discriminate unfairly, we pointed out and cited the
21 Court to legislative history, which has subsequently been
22 provided that insofar as the plan gives equivalent treatment
23 to two classes; namely, the senior noteholders, and the
24 other parent claims that have unequal rights under the PHONE
25 subordination. Namely, we have those rights, and the other

1 parent claims do not. The plan clearly violates the
2 requirement that it not discriminate unfairly because the
3 relative entitlements under subordination provisions has to
4 be reflected in the relative priorities in the relative
5 distributions. In fact, that's the only illustration, the
6 only illustration of not-discriminate-unfairly principle
7 that one finds in the legislative history. Now originally
8 at the time I first argued this, there was only one argument
9 that the debtors had offered, or the plan proponents had
10 offered to justify this treatment. And to summarize, it was
11 basically this is how the settling LBO lenders want to
12 distribute their consideration. And just so that it's clear
13 that I'm not putting words in anyone's mouth, this is how
14 the DCL plan proponents described their arguments in their
15 brief at page 172 of the Confirmation Memorandum. They
16 said, "most importantly" -- "most importantly, the senior
17 lenders have determined that it is in their best interest,
18 as consideration for the settlement of LBO related causes of
19 action to provide for the recovery of Tribune's trade claims
20 and retiree claims as other parent claims." Well as I
21 pointed out then, you can't -- you can't get around the
22 absolute priority rule by making gifts, nor can you get
23 around the requirement of the plan not to discriminate
24 unfairly when you're not even making a gift, but basically
25 these are estate causes of action. They're not causes of

1 action of the retirees. They're not causes of action of
2 trade creditors. They're estate causes of action, and
3 someone who settles an estate cause of action is supposed to
4 give the consideration to the estate, and then the
5 consideration gets distributed in accordance with the
6 parties bankruptcy entitlement.

7 Now -- and just to put this in perspective, under
8 their theory, Your Honor, if the senior lenders had said,
9 you know, we want the other parent claims to get a hundred
10 cents on the dollar plus post deficient interest. And you
11 can give the senior noteholders whatever is left. Under
12 their theory, they can do that, and that's simply a
13 violation of the law. It's flagrant. They can't do it that
14 way, and they can't do it in a lesser way either. Now at
15 the conclusion of the hearing on -- of the opening argument,
16 following my remarks, Counsel for Oaktree came up with a new
17 theory to justify this. And according to counsel for
18 Oaktree, at least some of the claims that are classified as
19 other parent claims, including assertively the swap claim,
20 actually do have the benefit of the contractual PHONE
21 subordination. Now preliminarily, Your Honor, I would note
22 that if -- and he didn't say all. He said some. Well, if
23 some other parent claims are entitled to the benefit of that
24 subordination, and some aren't, you have a huge problem of
25 misclassification because you can't classify claims that are

1 the beneficiaries of subordination with claims that aren't
2 and treat them all the same. So if Counsel is right, you'd
3 have to go plan by plan and figure out which one belongs
4 where, but happily for everyone, we don't have to go through
5 that brain numbing exercise because the fact is that none of
6 the other parent claims, including the swap claim are
7 entitled to the benefit of the contractual subordination.
8 Now the -- preliminarily the indenture is in evidence, and I
9 don't think this is an evidentiary objection. It's
10 construing and unambiguous document without evidence, and I
11 think that's an issue of law. And I believe someone else
12 actually gave the Court a copy of the indenture. It's an
13 exhibit, 0963, but I think the Court has the PHONES
14 indenture.

15 THE COURT: I have it.

16 MR. PACHULSKI: And if -- okay. And if the court
17 will turn -- and I'm not sure if the pagination that I have
18 is right, but the definition of senior indebtedness is on
19 page 62, at least in my copy, and it should be around page
20 62 in the Court's copy. And there's a defined term, senior
21 indebtedness. Okay. Now to be senior indebtedness, you
22 have to be Indebtedness with a capital I. So we have to ask
23 ourselves is the swap claim indebtedness. And now here I'm
24 going to paraphrase. There are four things to qualify as
25 Indebtedness with a capital I. The first is all obligations

1 represented by notes, bonds, indentures, or similar evidence
2 of indebtedness. The second is all indebtedness for
3 borrowed money or for the deferred purchase price other than
4 on normal trade terms -- and I'm paraphrasing --
5 paraphrasing -- the third is parental payments under a
6 capital lease, and the fourth is for a guarantee of any of
7 the first three items.

8 Now Your Honor, a swap claim isn't any of these.
9 It's not a claim for borrowed money. If you look at the
10 swap agreement which is actually another exhibit, it's
11 Exhibit 2300, it was filed as part of a proof of claim. It
12 doesn't look anything like a note, a debenture, a bond, or
13 any similar instrument. It's clearly not a rental payment
14 under a capital interest under a capital interest
15 [indiscernible]. And in fact, to confirm what I just said,
16 I think the best thing to do is look at how the DCL
17 proponents, including Oaktree, characterize the swap claim
18 at page 145 of the Confirmation Memorandum. According to
19 them, a fundamental characteristic of an interest rate swap
20 is that the counterparties never actually loan or advance
21 the notional amount. Well, there goes the borrowed money
22 argument. The swap involves an exchange of periodic
23 payments calculated by reference to interest rates and a
24 hypothetical notional amount. Well, that explains why you
25 don't have a note, because you don't even know who's going

1 to owe who money when or what the amount will be. So that's
2 why you have this convoluted swap agreement and not a simple
3 debenture or bond.

4 And finally, they say the senior loan claims, on
5 the other hand, are for money loaned. By implication, the
6 swap claims are not for money loaned. So given all of those
7 facts, clearly the swap claims are not entitled to the
8 benefit of the contractual subordination. Now briefly, as
9 to trade payables, the definition of senior indebtedness
10 makes it clear that even if a trade payable is represented
11 by a note, it's still not Indebtedness because a specific
12 carve-out for trade payables in part C of the definition of
13 senior indebtedness. And similarly, retiree claims don't
14 fall into any of these categories. So it's clear that other
15 parent claims were properly classified separately from
16 senior note claims because of none of them is entitled to
17 the benefit of subordination. What was improper is giving
18 them the same treatment.

19 Now this discussion of the swap claim is a good
20 segue to our second point, which is that -- which has to do
21 with the overpayment of the swap claims. In the opening
22 argument --

23 MR. JOHNSTON: Your Honor --

24 MR. PACHULSKI: -- we pointed out that --

25 THE COURT: Mr. Pachulski, let me ask you to

1 pause for one moment. Yes, Mr. Johnston.

2 MR. JOHNSTON: Your Honor, I apologize for
3 interrupting, but this is another bait and switch. This
4 argument regarding the swap claim that Mr. Pachulski's about
5 to unveil, again, was never argued or even mentioned in
6 Brigade's confirmation objection. And I think more
7 importantly, it was argued extensively at length in the
8 noteholders' confirmation objection, and is on the list of
9 issues that the noteholders intend to argue tomorrow. I
10 just don't want to be put in a position, Your Honor, of
11 having to respond to this argument twice. This is not
12 something that is in the Brigade brief. It's more properly
13 considered tomorrow.

14 MR. PACHULSKI: Your Honor, in the course of --
15 well, first of all, just so we're clear, on the chart that I
16 was served with that listed our objections, and I don't have
17 handy, but this argument is on the chart as a Brigade
18 objection. So --

19 MR. JOHNSTON: As a Brigade objection raised in
20 oral argument -- or opening argument, not in the brief.

21 MR. PACHULSKI: Well, the chart did not
22 distinguish between arguments made orally and in the brief,
23 and at the opening argument, I made it clear that we were
24 joining in the -- we were joining in the noteholder
25 objection on this point, and I amplified the point to

1 provide legislative history that was not provided. And
2 beyond that, at the close of that argument, Mr. Bennett
3 specifically raised the issue of subordination. Well (a) I
4 couldn't reply at that time, and (b) I thought it would be a
5 good idea to actually read the provision before I responded.
6 So given the fact that Mr. Bennett himself raised the
7 argument claiming that the swap claims were entitled to this
8 subordination, I was entitled to assume that somebody had
9 actually read the subordination provision before they made
10 the argument. Now personally, Your Honor, I don't care if
11 this argument is made today or tomorrow, but I -- but as to
12 the subordination issue of the swap, it was squarely placed
13 at issue by Mr. Bennett at that hearing, and the terms of
14 the subordination agreement -- I'm not asking the Court to
15 consider evidence, and given the fact that the chart assumed
16 that this was an argument I had made, I had assumed it was
17 an argument I would be able to present today. And in fact
18 looking at a copy of today's agenda, one of the specific
19 items under Brigade, and maybe this was handwritten in by
20 someone, I thought was swap.

21 THE COURT: Well --

22 MR. PACHULSKI: So if I'm not supposed to make
23 this argument today, I'm sorry, but based on everything I
24 read, I assumed I was.

25 THE COURT: Well let me ask you to pause for a

1 moment. I remember at the opening I suggested to you that
2 you supplement your objection to memorialize what you had
3 argued. Did you do that?

4 MR. PACHULSKI: Excuse me, Your Honor, actually
5 that's -- that's not quite what happened. I asked for
6 permission to supplement my presentation on the not-
7 discriminate-unfairly requirement because it was legislative
8 history that no one had cited. And here I'm paraphrasing.
9 I'm sorry. I don't have the transcript, but you basically
10 said that I could submit a supplement that was simply
11 limited to providing that legislative history because I
12 believe you indicated you didn't want to encourage people to
13 start filing additional briefs at that time. And so I made
14 it clear to the Court, respecting the Court's desire to
15 limit the flood of papers, that I would provide a copy of
16 the legislative history without argument, and that's exactly
17 what I did. I would have been happy to argue in that
18 pleading but my impression was that the Court didn't want me
19 to do it.

20 THE COURT: Well I fall back into a -- just a
21 principle of how Courts consider arguments, and that is they
22 consider them based upon positions taken on pleadings. And
23 what I hear from Mr. Johnston is that this argument that
24 you're making is not embodied in a pleading of yours. Now
25 you did say, but I haven't read it. You did say you joined

1 in a pre-existing objection that made this objection.

2 MR. PACHULSKI: At the time oral -- at the time
3 of opening argument, Your Honor, without objection by
4 anybody, I indicated that in the noteholders' memorandum,
5 and it's towards the end, they had discussed -- and they
6 cited a number of statutory provisions including 1129(b). I
7 pointed out that they had noted that the plan distributions
8 were violative of the waterfall resulting from the
9 subordination provision, and among the provisions they
10 quoted was 1129(b) and I amplified on that. I also argued
11 separately, and this was in -- I argued separately, and this
12 is also something that they had pointed out, that the swap
13 claims were being overpaid; that what had basically
14 happened, and they've chronicled this chronology. I wasn't
15 aware of this chronology until I read it in their paper;
16 that in April of -- April, I think it was 2010, Oaktree
17 opposed a compromise that was then reached. Around June or
18 so, they bought the swap claim. At the time they bought the
19 swap claim, the debtors were going to treat it like any
20 other senior loan claim. It would have received like one
21 and a half cents at the parent level. I then pointed out
22 again, based on what was in the noteholder brief that as
23 part of the settlement in September, in the course of
24 getting Oaktree to become a plan proponent, all of a sudden
25 the swap claim went from being treated as a senior lender

1 claim to being treated as another parent claim on a parody
2 with all other parent claims and on a parody with our claim.
3 Nobody objected at the time, and it was all based on facts
4 in the noteholder brief. The only thing I've been doing now
5 so far, other than what I said at oral argument, is
6 responding to a specific argument that mischaracterized the
7 terms of the subordination agreement.

8 MR. JOHNSTON: Your Honor, the key point there
9 was this is all coming straight from the noteholder brief,
10 and presumably we're going to hear it all again tomorrow.
11 We should do this once.

12 THE COURT: Well --

13 MR. GOLDEN: Can I be heard one --

14 THE COURT: Yes, Mr. Golden.

15 MR. GOLDEN: Thank you. Your Honor, look, I
16 don't -- I resent the notion that this is bait and switch.
17 I had -- we had a personal phone call with Mr. Sottile and
18 Mr. Lantry late last week where we went over in excruciating
19 detail what would be agenda for today's hearing. Mr.
20 Sottile and Mr. Lantry certainly knew that Mr. Pachulski
21 intended to raise the swap argument and the unfair
22 discrimination argument. Whether they failed to communicate
23 that to Mr. Johnston, I don't know, but we're now talking
24 about two of the four DCL plan proponents. So this isn't a
25 question of surprise, and I don't want Mr. Pachulski to be

1 put in a position that he is doing something inappropriate.
2 If the Court would like, and we want to adjourn this
3 discussion on the swap until after I present it initially,
4 and then allow Mr. Pachulski to weigh in as the joinder,
5 that's fine, too. But I don't think the Court should be
6 left with the misimpression that somehow there was a bait
7 and switch occurring here.

8 THE COURT: Well I don't want to be drawn....

9 THE COURT: Well, and I don't want to be drawn
10 into which -- into which I have been drawn --
11 (Laughter)

12 THE COURT: -- an argument about the argument.
13 You know I mean the parties here have been given and will be
14 given, you know, multiple opportunities to make their points
15 you know evidentiary, legal, and both. Well, let me put it
16 this way, Mr. Johnston. You don't have to answer today.
17 How's that? Does that solve your problem?

18 MR. JOHNSTON: If that's the way Your Honor wants
19 to proceed, obviously I have no choice, so --

20 THE COURT: You don't want to argue it twice and
21 I don't want to hear it twice. I -- you know we're on the
22 same plane there.

23 MR. JOHNSTON: All right.
24 (Laughter)

25 MR. JOHNSTON: I'll hear what Mr. Pachulski has

1 to say and make a decision then. Thank you.

2 THE COURT: All right. Mr. Pachulski, you may
3 conclude.

4 MR. PACHULSKI: And I apologize, I just have to
5 tell you when I read page 15 of their chart of unresolved
6 objections and they said swap claim and they said unfair
7 discrimination, I must have misunderstood something and I
8 didn't mean to create much of a ruckus. I thought my
9 participation in this would take a couple of minutes.

10 Anyway, let me just get back on my train of
11 thought. All right. So basically with respect to the swap
12 claim, I think we've beaten the unfair discrimination issue
13 to death, but there was also another concern we had raised
14 and I believe the noteholders also raised, which is that the
15 swap claim is being treated as if there were no defenses to
16 the swap claim. It's basically a complete surrender and the
17 theory is that even though the swap claim was an integral
18 part of the LBO transaction, in fact it was required by the
19 credit agreement, that it is subject to other potential
20 defenses that might not be available to the senior lenders.
21 Well, the fact that it might be subject to other defenses
22 might be a grounds for some sort of a settlement, but this
23 wasn't a settlement. It was a complete surrender by the
24 debtors on the point. And I'd like to quote from -- and
25 this will brief, from one part of their brief as to sort of

1 their theory. At page 147, they point to the fact that the
2 examiner found that it is reasonably likely that a Court
3 would find that the obligations arising from the termination
4 of the swap documents are not avoidable. Now reasonably
5 likely. Now you'll recall earlier in this case when Mr.
6 Sottile was talking about similar language in the context of
7 Mr. Zell's issues. Mr. Sottile stated and I'm quoting here,
8 that is the stuff of litigation. And we agree. We actually
9 agree with Mr. Sottile on this. The problem is it's not
10 right to say that that is the stuff of litigation against
11 Mr. Zell because he opposes the plan and that is the stuff
12 of a complete surrender, which is what happened with Oaktree
13 on the swap claim.

14 And so the point that I'd like to leave the Court
15 with and now I'm kind of coming full circle, is that there
16 is no justification for what they did with the swap claim,
17 either in terms of treating it on a parody with our claims
18 or in terms of treating it as there were no defenses. They
19 gave the swap claim another \$50 million in value at the same
20 time that they coincidentally reduced the distribution to
21 senior noteholders between the April proposal and the
22 October proposal, so this didn't cost the bank anything and
23 this whole history puts us back into the world of
24 Featherworks, which I cited in opening arguments without
25 objection, which is basically we have a situation where the

1 swap claims were being overpaid, beyond their legal
2 entitlement, simply as a basis to get them to switch from
3 becoming a plan opponent to a plan proponent. And with that
4 I will conclude and thank the Court for its indulgence.

5 THE COURT: Thank you.

6 MR. JOHNSTON: Your Honor, I think I'd like to
7 take you up on your invitation and respond to these
8 arguments once I've heard them all with respect to the swap
9 claim, so I'll do it tomorrow.

10 THE COURT: Very well.

11 MR. JOHNSTON: Thank you.

12 THE COURT: All right. Anyone else? Okay.

13 MR. LEMAY: Your Honor, David LeMay from
14 Chadbourne and Parke for the Creditors Committee. I've been
15 tasked with the unfair discrimination prong of this and it
16 would be convenient for me to deal with all of the unfair
17 discrimination claims, both those raised by the noteholders
18 and those raised by Mr. Pachulski all at once, but I'm
19 perfectly happy to just talk a little bit about Mr.
20 Pachulski's objection since he's lodged it. But I have a
21 different sort of procedural model and that's this, I
22 understand that the ground rule here is that we are here
23 today to talk about legal arguments and non-evidentiary
24 matters. And Mr. Pachulski has made an argument about
25 unfair discrimination and I believe has pitched it as a

1 purely legal matter. I guess my model, Your Honor, is that
2 it seems to me that the question of unfair discrimination in
3 the Third Circuit involves a threshold inquiry about whether
4 the discrimination is material. And why do I say that? I
5 say that that's that -- I say that because that's what the
6 District Court in Armstrong, later affirmed by the Third
7 Circuit, tells us. So Mr. Pachulski's legislative history
8 is good, but I think Armstrong, Third Circuit Law, is better
9 and that Third Circuit Law sends us into a fact question.
10 And the fact question turns out to have been answered by Mr.
11 Whitman in his testimony. I'm not sure and I don't want
12 people yelling at me, whether I'm supposed to talk about
13 that. But there's no way that I can meaningfully address
14 the Armstrong materially test without advertizing to the
15 evidence. And so I thought I'd pause for a moment and ask
16 Your Honor what you'd like me to do.

17 THE COURT: I can't imagine anyone would yell at
18 you, Mr. LeMay.

19 (Laughter)

20 THE COURT: But you may proceed.

21 MR. LEMAY: Thank you, Your Honor. I and so the
22 question of unfair discrimination that's been raised by Mr.
23 Pachulski is not simply a pure application of statutory law
24 in the way that absolute priority on cram down is. It's
25 become very clear and I believe Mr. Pachulski has perhaps

1 inadvertently conflated a couple of different threads in the
2 law, but it's become very clear in the light of recent
3 jurisprudence that testing unfair discrimination as between
4 two equal classes is a different exercise than testing for
5 absolute priority when something goes to a junior class over
6 an intervening dissenting class. Here there is no
7 intervening dissenting class, there's no junior class. Mr.
8 Pachulski's problem is he says that the parent general
9 unsecured creditors have gotten more than they ought to have
10 at the expense of the bondholders. And I think it's pretty
11 clear under modern law that that does not involve the
12 application of the very strict kind of rules that pop up
13 when you're dealing with absolute priority, but rather a
14 more subtle test which grew out of a publication by a
15 Professor Markell that was published -- I'm sorry -- that
16 was picked up by a number of Courts, including the Armstrong
17 Court, which looks at unfair discrimination in the context
18 of two parallel classes from the point of view first of all
19 of is there discrimination and is it material? And in that
20 context the progeny of the cases under that four part test
21 make it very clear that in viewing unfair discrimination,
22 the level of discrimination or the level of change has to be
23 grossly disproportionate. There's a case called Great Bay
24 which says that Courts that have rejected confirmation on
25 the basis of unfair discrimination have confronted plans

1 proposing grossly disparate treatment, 50 percent or more,
2 to similarly situated creditors. And there are other cases
3 along the same line. What all those cases tell you, Your
4 Honor, is that before you even need to engage meaningfully
5 on this issue, you've got to find that there is A,
6 discrimination and B, that it's meaningful.

7 THE COURT: Well --

8 MR. LEMAY: Now --

9 THE COURT: -- let me ask you to pause there.

10 This is the Markell I guess proposal, who was then a
11 professor at the time and then I think I discussed in Exide,
12 but didn't adopt. I don't know that the circuit here has
13 adopted it yet, now Judge Markell.

14 MR. LEMAY: Well, it was I think adopted by the
15 District Court in Armstrong and of course that was affirmed.
16 The District Court in Armstrong sets forth the standard,
17 cites to the article, and then the District Court says,
18 having set forth that article, if there is an allegation of
19 a materially lower percentage recovery, the presumption can
20 be rebutted by showing that and then it goes on to show how
21 you rebut the presumption. But I take it from the District
22 Court and its opinion that since it engaged in the
23 materiality analysis, that it must have adopted the
24 reasoning behind that test and the need for materiality,
25 because they wouldn't have done the exercise that they did.

1 THE COURT: Okay. And what you're telling me is
2 that it's a persuasive Decision, but not a controlling
3 Decision on this Court.

4 MR. LEMAY: I'd say that's true, yes. I didn't
5 mean to suggest that it was --

6 THE COURT: No, because it was not the focus of
7 the appeal of the Appellate --

8 MR. LEMAY: That's absolutely right, Your Honor.

9 THE COURT: Okay.

10 MR. LEMAY: No. And I certainly wouldn't mean to
11 oversell the case, but I do think it's the right way to go
12 and I think it's the way that the modern trend in these
13 unfair discrimination cases has gone, to distinguish on the
14 one hand between a very strict rule on gifting in the
15 absolute priority context and a somewhat different unfair
16 discrimination thing. So I didn't mean to oversell it and
17 I'm not suggesting that it's binding Third Circuit Law. I
18 do think that it is the best way of thinking about these
19 issues.

20 At any rate, Your Honor, that then brings us to
21 the factual issue. Your Honor will remember that Mr.
22 Whitman testified. His testimony was unrebutted. I don't
23 think there's any other testimony in the record. And Mr.
24 Whitman's testimony on direct examination was that the -- in
25 effect the net harm suffered by the senior noteholders was

1 in the vicinity of \$40,000. There was on cross examination
2 and I can give page cites if that's helpful. There was on
3 cross examination a little bit of an attempt to sort of have
4 at him on that, but I believe his testimony is quite
5 consistent that the harm to the bondholders that's being
6 complained of as a factual matter is in the range of \$30,000
7 to \$40,000. As I say, that testimony I believe is the only
8 testimony on the record in the issue. And so if that's the
9 case, I think we are infinite worlds away from the kind of
10 material harm or gross disproportionality that the cases
11 talk about and that therefore this is much ado about
12 nothing.

13 The other thing I would point out is I guess that
14 to the extent that the Court later finds that the settlement
15 is a reasonable settlement and that the economic
16 justification for the settlement makes sense, then it is
17 going to be correct to say that what happened and Mr.
18 Pachulski disputes this, that what in effect happened here
19 is that the senior lenders parted with a piece of their
20 recovery to bring the parent general unsecured creditors up
21 to the same level as the bondholders. Now to be sure, if
22 the Court later finds that the settlement itself doesn't
23 pass muster, then that won't work. But at that point we all
24 have much larger problems and so I think it's a -- I think
25 it's actually a footnote. So for all those reasons, Your

1 Honor, I think that this can be disposed of relatively
2 easily, this issue of unfair discrimination, by simply
3 focusing on issues of materiality and the size of the
4 amounts involved. So that's my pitch on unfair
5 discrimination. As to the Brigade objection, I guess you
6 might hear a somewhat similar theme from me tomorrow, but I
7 won't repeat myself.

8 THE COURT: Thank you. Anyone else? Okay. Have
9 we reached the end of the third party objections?

10 MR. SOTTILE: We have, Your Honor.

11 THE COURT: Well, of the argument anyway. Okay.
12 Is there any further business for today?

13 MR. SOTTILE: Not on the side of the DCL plan
14 proponents, Your Honor.

15 MR. GOLDEN: None here, Your Honor. Just what
16 time are we -- I'd like to know what time we are planning to
17 restart tomorrow.

18 THE COURT: I'm glad you asked that question.
19 10:00. I have a matter that I heard -- that I scheduled on
20 short notice for 9:30 tomorrow morning and because it's on
21 short notice, objections are not due until the time of
22 hearing, although I'm supposing given the nature of the
23 relief that's been requested that objections are unlikely,
24 but it's been a contested case, so I won't promise you
25 anything. I just ask that when we're going through that

1 proceeding as parties move in and out of the courtroom to
2 get ready for 10:00 that they do so with consideration for
3 those before the Court.

4 Okay. Let me just give you -- cover some other
5 things. I've received and reviewed both of the letters and
6 I'm perfectly okay with what's been proposed with respect to
7 I guess I'll call them the afternoon arguments, although we
8 can start in the morning if we get you know -- get that far.
9 (Laughter)

10 THE COURT: But each side has proposed. I have
11 nothing to add to that. I think I am going to allow short,
12 maybe in letter form, post-hearing submissions by other
13 objectors whose objections I did not resolve from the bench
14 today. So I haven't decided anything other than what I've
15 just told you, so the parties can think about that overnight
16 and if someone wants to comment on that tomorrow they're
17 welcome to.

18 I also -- well, again something for the parties
19 to think about, but I'd like to find a way somehow to get
20 everything teed up in such a way that I have all of the
21 written submissions prior to the commencement of closing
22 argument and we'll talk about a date in a minute. And by
23 that I mean I think I am going to ask for submission of
24 proposed findings and conclusions. And given the timeframe
25 which will exist between the end of the day tomorrow and the

1 briefing schedule and closing arguments, I also assume
2 and/or encourage final amendments to the proposals to the
3 extent certain of the objections that were not resolved
4 today can be resolved by language changes to the respective
5 plans and find a way to get them to the Court early enough
6 that I can have a full understanding of exactly where
7 everyone is because at some point you know we're going to
8 have to freeze time and the other reason for that is obvious
9 I'm sure.

10 Finally, let me just throw out a couple of
11 suggestions for dates. The briefing proposal has the last
12 submission May 27. I will tell you the next available time
13 beyond June 3, which I think is way too close to the
14 submissions, is the week of June 13. And I would propose to
15 make, assuming closing can be had in a day, either the 14th
16 or 15th of June available for that. I do have something
17 scheduled for those days now and I've yet to inform the soon
18 to be unhappy parties that they're not trying their case
19 that week. But I felt in balancing the respective urgencies
20 I wanted to clear some time for closing here. So think
21 about those dates and see if the parties can agree upon one.
22 And if for any reason they are not suitable, we'll try
23 something else. All right. Are there any questions? All
24 right. Thank you all very much. That concludes today's
25 session. Court will stand adjourned.

1

2 (Whereupon, at 5:03 p.m., the hearing was adjourned.)

3

4

CERTIFICATION

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I certify that the foregoing is a correct
transcript from the electronic sound recording of the
proceedings in the above-entitled matter.

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14 April 2011

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Transcriber

Date

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